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THE LAW AND PRACTICE
AS TO
RECEIVERS
APPOINTED BY
THE HIGH COURT OF JUSTICE
OR
OUT OF COURT.

BY THE LATE
WILLIAM WILLIAMSON KERR, M.A.,
OF LINCOLN'S INN, BARRISTER-AT-LAW.

SIXTH EDITION

BY
FRANK C. WATMOUGH, B.A.,
OF THE MIDDLE TEMPLE.

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PREFACE

TO THE SIXTH EDITION.

IN this edition no alteration has been made in the general arrangement of the work, but certain paragraphs have been rearranged with a view to greater conciseness and homogeneity, and certain matters not previously dealt with have been noticed.

The subject of managers, which is contained in Chapter XIII., has been dealt with in several important decisions since the publication of the last edition, and the chapter in question has been re-written and considerably enlarged. The topic is one of increasing importance, and, as appears from the conflict of judicial opinion in the case of *Moss Steamship Co. v. Whinney*, the law is still far from being settled. The decisions form an interesting chapter in the history of the gradual evolution of legal doctrines as to goodwill and its recognition as a form of property.

The portions of the work dealing with receivers in debenture holders' actions have been carefully revised and considerably enlarged.

It is hoped that no material case decided since the publication of the last edition has been omitted.

F. W.

21, OLD SQUARE, LINCOLN'S INN,
August, 1912.

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A TREATISE ON THE LAW AND PRACTICE AS TO RECEIVERS APPOINTED BY THE HIGH COURT OF JUSTICE OR OUT OF COURT.

CHAPTER I.

PRINCIPLES ON WHICH A RECEIVER IS APPOINTED BY THE HIGH COURT OF JUSTICE.

THE jurisdiction of the Court of Chancery to appoint a receiver was assumed for the advancement of justice, and was founded on the inadequacy of the remedy to be obtained in the courts of ordinary jurisdiction. Where the remedy afforded by the courts of ordinary jurisdiction was inadequate for the purposes of justice, the Court of Chancery would *ex debito justitiæ*, on a proper case being made out, appoint a receiver (*a*). Chap. I.
Jurisdiction.

The Courts of Common Law had not, under the former procedure, jurisdiction to appoint a receiver. But by the

(*a*) *Hopkins v. Worcester, &c.* Giffard, L.J. See *Cupit v. Jackson*, L. R. 6 Eq. 447, *per* son, 13 Pri. 734.

Chap. I. Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 16, all the jurisdiction of the Court of Chancery was transferred to the High Court of Justice; and by s. 25, sub-s. 8 of that Act it is declared, that a receiver may be appointed by an interlocutory order of the court in all cases in which it shall appear to the court to be just and convenient that such order should be made; and that any such order may be made either unconditionally, or upon such terms and conditions as the court shall think fit. The effect of the sub-section is to enlarge very much the powers which the Court of Chancery formerly possessed (*b*). Under this enactment, there is no limit to the power of the court to appoint a receiver on an interlocutory application, except that such power is only to be exercised where "just or convenient" (*c*).

The words "just or convenient" must, however, be construed with reference to the existing law of the country. They only empower the court to appoint a receiver in aid of existing rights (*d*). The Act does not empower the court to appoint a receiver in cases where prior to the Act it had no jurisdiction to do so (*e*), it relaxed certain inconvenient rules, but it did not alter the principles on which the jurisdiction of the Court of Chancery rested (*f*).

(*b*) *Anglo - Italian Bank v.* 360.

Davies, 9 Ch. D. 275, at p. 286,
per Jessel, M.R., *ib.* at p. 293,
per Cotton, L.J.

(*c*) *Garthorpe v. Garthorpe*,
W. N. 1878, 91, per Jessel, M.R.;
Coney v. Bennett, 29 Ch. D. 993.
See *Real and Personal Advance*
Co. v. Macarthy, 27 W. R. 706;
Oliver v. Lowther, 28 W. R. 381.

(*d*) *Philipps v. Jones*, 28 Sol. J.

(*e*) *Holmes v. Millage* [1893],
1 Q. B. 551; *Harris v. Beauchamp* [1894], 1 Q. B. 801;
Edwards & Co. v. Picard [1909],
2 K. B. 903, but see dissenting
judgment of Moulton, L.J.

(*f*) Per Lindley, L.J. in
Holmes v. Millage [1893], 1
Q. B. p. 557.

The jurisdiction of the court relative to the appointment of receivers and the authority to be given them has been further enlarged by the provisions of R. S. C., Ord. L., where it is necessary to preserve property which is in dispute in a pending action (*g*).

The court will not appoint a receiver where the appointment might prejudice existing rights (*h*). The court accordingly will not interfere with the executor's legal right of retainer by appointing a receiver at the instance of the plaintiff in a creditor's administration action merely because the executor will probably exercise his right to the prejudice of the general body of creditors (*i*).

The words "interlocutory order" in the Judicature Act, 1873, s. 25, sub-s. 8, are not confined in their meaning to an order made between writ and final judgment, but mean an order other than an order made by way of final judgment in an action, whether such order be made before judgment or after (*k*).

The court has the same power of appointing a receiver at the trial of the action as it has on interlocutory application (*l*).

A receiver in an action is an impartial person appointed by the court to collect and receive, pending the proceedings, the rents, issues and profits of land, or the produce of personal estate or other things in question, which it does not seem reasonable to the court that either party should collect or receive, or where a party is incompetent

Nature of
the office.

(*g*) *Per* Farwell, L.J. in *Leney and Sons v. Callingham* [1908], 1 K. B. 79, and see *Chaplin v. Barnett*, 28 T. L. R. 256.

(*h*) *Re Wells*, 45 Ch. D. 569.

(*i*) *Re Wells*, 45 Ch. D. 569.

(*k*) *Smith v. Cowell*, 6 Q. B. D. 78.

(*l*) *Re Prytherch*, 42 Ch. D. 590.

Chap. I. to do so, as in the case of an infant. A receiver can only be properly granted for the purpose of getting in and holding or securing funds or other property, which the court at the trial, or in the course of the action, will have the means of distributing amongst, or making over to, the persons or person entitled thereto (*m*).

The object sought by the appointment of a receiver may be described generally to be to provide for the safety of property, pending the litigation which is to decide the rights of litigant parties (*n*), or during the minority of infants, or to preserve property in danger of being dissipated or destroyed by those to whom it is by law entrusted, or by persons having immediate but partial interests therein (*o*). Independently of the Judicature Act, 1873, when a plaintiff has a right to be paid out of a particular fund, the court will appoint a receiver to protect that fund from being dissipated so as to defeat his rights (*p*).

Appoint-
ment a
matter of
discretion.

The appointment of a receiver is a matter resting in the sound discretion of the court (*q*). In exercising its discretion the court proceeds with caution, and is governed by a view of all the circumstances of the case. No positive or unvarying rule can be laid down as to whether the court will or will not interfere by this kind of *interim* protection of the property. Where, indeed, the property is as it were *in medio*, in the enjoyment of no one, the court can hardly do wrong in taking possession. It is

(*m*) *Erans v. Coventry*, 3 Drew. 80; see, too, *Wright v. Vernon*, ib. 121.

(*n*) *Tullett v. Armstrong*, 1 Keen, 428; *Owen v. Homan*, 4 H. L. C. 1032.

(*o*) Mitf. Pl. 133.

(*p*) *Cummins v. Perkins* [1899], 1 Ch. 16, 19, *per* Lindley, M.R.

(*q*) *Greville v. Fleming*, 2 J. & L. 339; *Re Prytherch*, 42 Ch. D. 590; *Re Henry Pound, Son, & Hutchins*, ib. 419.

the common interest of all parties that the court should prevent a scramble. Such is the case where the receiver of property of a deceased person is appointed pending a litigation as to the right to probate or administration. No one is in the actual enjoyment of property so circumstanced, and no wrong can be done to any one by taking and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in enjoyment, the case is necessarily involved in further questions. The court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant; in some cases an irreparable wrong. If the plaintiff should eventually fail in establishing his right against the defendant, the court may by its *interim* interference have caused mischief to the defendant for which the subsequent restoration of the property may afford no adequate compensation. In all cases, therefore, where the court interferes by appointing a receiver of property in the possession of the defendant, before the title of the plaintiff has been judicially established, it exercises a discretion to be governed by all the circumstances of the case. Where the evidence on which the court is to act is very clear in favour of the plaintiff, there the risk of eventual injury to the defendant is very small, and the court does not hesitate to interfere. Where there is more of doubt, there is of course more of difficulty. The question is one of degree, as to which, therefore, it is impossible to lay down any precise or unvarying rule (r).

The procedure of the King's Bench Division in relation to the appointment of a receiver should, as far as possible,

(r) *Owen v. Homan*, 4 H. L. C. 1032, *per* Lord Cranworth.

Chap. I. be analogous to the procedure in like circumstances of the Chancery Division (s).

The High Court has jurisdiction to appoint a receiver in a proper case, although another court has already appointed a receiver over the same property in a concurrent action (t), and will stay further proceedings in such concurrent action if in the circumstances of the case they are vexatious (u). Thus, an equitable mortgagee had commenced an action in the Palatine Court and obtained a receiver therein *ex parte*, after a writ had, to his knowledge, been issued in a debenture holders' action in the Chancery Division relative to the same, amongst other, property; Parker, J., who had appointed a receiver in the Chancery action without knowledge of the order made in the Palatine action, restrained the plaintiff in the latter action from further proceeding therewith, on the ground that all matters in dispute could be adjusted in the Chancery action, whereas some only of them could be dealt with in the Palatine action, and that the conduct of the plaintiff in the latter action was in the circumstances vexatious: this decision was affirmed by the Court of Appeal (x).

Principles
which
govern the
discretion
of the
court.

The duty of the court, upon a motion for a receiver, is merely to protect the property in the meantime for the benefit of those persons, or that person, to whom the court at the trial of the action, when it will have before it all the evidence and materials necessary for a determi-

(s) *Walmsley v. Mundy*, 13 Q. B. D. 807.

(t) *Nothard v. Proctor*, 1 Ch. D. 4.

(u) *Re Connolly Bros., Ltd.* [1911], 1 Ch. D. 731.

(x) *Re Connolly Bros., Ltd.*, *supra*; the proper course where such an order has been made is to apply in the concurrent action for the discharge of the receiver appointed therein.

nation, shall think it properly belongs (*y*). On a motion for a receiver the court will not prejudice the action (*z*), or say what view it will take at the trial (*a*). In dealing with the application the court is bound to express its opinion only so far as it is necessary to show the grounds on which the interlocutory motion is disposed of. It is the duty of the court to confine itself strictly to the point which it is called upon to decide, and not to go into the merits of the case (*b*). Indeed, the court will not appoint a receiver at the instance of a person whose right is disputed, where the effect of the order would be to establish the right, even if the court be satisfied that the person against whom the demand is made is fencing off the claim (*c*).

In determining whether it shall appoint a receiver, the court deals with the case as it appears upon the pleadings and evidence, and stands on the record (*d*). If the court is satisfied upon the materials it has before it that the party who makes the application has established a good *prima facie* title, and that the property the subject-matter of the proceedings will be in danger, if left until the trial in the possession or under the control (*e*) of the party against whom the receiver is asked for (*f*), or, at least, that there is reason to apprehend that the party who

(*y*) *Blakeney v. Dufaur*, 15 Beav. 42.

(*z*) *Huguenin v. Basley*, 13 Ves. 107.

(*a*) *Fripp v. Chard Railway Co.*, 11 Ha. 264.

(*b*) *Skinnners' Company v. Irish Society*, 1 My. & Cr. 164.

(*c*) *Greville v. Fleming*, 2 J. & L. 335.

(*d*) *Silver v. Bishop of Norwich*, 3 Sw. 116, n.; *Skinnners' Company v. Irish Society*, 1 My. & Cr. 164.

(*e*) *Cummins v. Perkins* [1899], 1 Ch. 16; *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79.

(*f*) *Evans v. Corentry*, 5 D. M. & G. 918.

Chap. I. makes the application will be in a worse situation if the appointment of a receiver be delayed (*g*), the appointment of a receiver is almost a matter of course (*h*). If there is no danger to the property, and no fact is in evidence to show the necessity or expediency of appointing a receiver, a receiver will not be appointed, unless there be some other equity in the case to support the application (*i*). The mere allegation of danger to the property is not sufficient, if the court is satisfied that no loss need be apprehended (*k*). If, however, it be the true and necessary result of the pleadings, as they stand, that the property is in danger, or that loss may be apprehended, there is a case for a receiver (*l*).

It is not, however, necessary, in order to entitle a party to the appointment of a receiver, that the property in question should appear to be in danger, unless the appointment be made. It is enough that a good equitable title be made to appear, and that the ordinary remedy would not fulfil the requirements of justice (*m*). A receiver, accordingly, may, on a proper case being made out, be appointed to raise the arrears of an annuity (*n*), or a rent-charge (*o*); so, also, an equitable

(*g*) *Aberdeen v. Chitty*, 3 Y. & C. 382; *Thomas v. Davies*, 11 Beav. 29.

(*h*) See *Middleton v. Dodswell*, 13 Ves. 266; *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272; *Real and Personal Advance Co. v. Macarthy*, 27 W. R. 706.

(*i*) *Whitworth v. Whyddon*, 2 Mac. & G. 55; *Wright v. Vernon*, 3 Drew. 121; *Micklethwaite v. Micklethwaite*, 1 D. & J. 530.

(*k*) *Whitworth v. Whyddon*, 2

Mac. & G. 55.

(*l*) *Evans v. Coventry*, 5 D. M. & G. 917.

(*m*) See *Cupit v. Jackson*, 13 Pri. 734; *White v. Smale*, 22 Beav. 73; *White v. James*, 26 Beav. 191.

(*n*) *Ib. Beamish v. Austen*, Ir. R. 9 Eq. 361; and see *infra*, p. 36.

(*o*) *White v. Smale*, 22 Beav. 73.

mortgagee may have a receiver appointed if the payment of interest on his security be in arrear (*p*); so, also, if a person takes the conveyance of a legal estate, subject to equitable interests, he must satisfy these equitable interests, or submit to the appointment of a receiver (*q*).

The court, on the application for a receiver, always looks to the conduct of the party who makes the application, and will refuse to interfere unless his conduct has been free from blame (*r*). Parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to the court for a receiver (*s*).

The record should be in such a state as will enable the judge to determine who is to take out of court the fund which the appointment of the receiver shall have brought into court (*t*). But if the court sees that upon the record there is a case for the appointment of a receiver, it is no sufficient answer that the record is not perfect as to particulars, and is not in the shape in which the court may find it necessary that it should be placed in order to administer complete justice. If the objection is a formal one, and such as may be removed by amendment, it will not stay its hand on account of any such objection. Objections on the ground of misjoinder, multifariousness, or want of parties, are no answer on the application for a receiver, if a case for the appointment of a receiver be shown (*u*).

Conduct of party who makes the application looked to.

Pleadings, parties, &c.

(*p*) *Infra*, p. 42.

(*q*) *Pritchard v. Fleetwood*, 1 Mer. 54.

(*r*) See *Baxter v. West*, 28 L. J. Ch. 169. Comp. *Wood v. Hitchings*, 2 Beav. 297.

(*s*) *Gray v. Chaplin*, 2 Russ. 147; *Skinnners' Company v. Irish*

Society, 1 My. & Cr. 162.

(*t*) *Gray v. Chaplin*, 2 Russ. 147.

(*u*) *Evans v. Coventry*, 5 D. M. & G. 918; *Hamp v. Robinson*, 3 D. J. & S. 109; *Re Johnson*, L. R. 1 Ch. 325.

Chap. I.

If the subject of the action in respect of which a receiver is sought is a matter of public interest, the Attorney-General should be made a party (*x*).

A receiver cannot be brought before the court except in cases of personal misconduct, nor, except in such a case, can costs be asked for against him (*y*).

In the Court of Chancery, when the original bill had been answered, the pendency of a plea to the amended bill did not prevent a motion for a receiver (*z*).

Further, where certain allegations in the bill and affidavits were relevant to the relief asked, that court would not on motion allow exceptions to be taken to them (*a*). Where, for instance, a bill for a receiver alleged that the executor was of bad character and drunken habits, the Court of Chancery would not, on motion for a receiver, allow exceptions for scandal and impertinence (*b*).

If a receiver is claimed generally, the court may grant the claim as far as is proper, or in a limited form (*c*).

Where a receiver has been appointed generally in an action, it is unnecessary, when the action comes on upon further consideration, to insert in the minutes a direction to continue the receiver (*d*). So, also, a receiver appointed on an interlocutory application before judgment need not be continued by the judgment (*e*), unless the appointment was in the first instance an *interim* appointment only (*f*).

(*x*) *Gray v. Chaplin*, 2 Russ.

147; *Skinnners' Company v. Irish Society*, 1 My. & Cr. 162.

(*y*) *General Share Co. v. Wetley Brick Co.*, 20 Ch. D. 260, 267; 30 W. R. 445, *per* Jessel, M.R.

(*z*) *Thompson v. Selby*, 12 Sim. 100.

(*a*) *Everett v. Prythergh*, 12 Sim. 365.

(*b*) *Ib.*

(*c*) *Major v. Major*, 8 Jur. 797.

(*d*) *Re Underwood*, 37 W. R. 428.

(*e*) *Davies v. Vale of Evesham Preserves*, W. N. 1895, 105; 73 L. T. 150; 43 W. R. 646.

(*f*) *Cruse v. Smith*, 24 Sol. J. 121.

If the judgment continues a receiver who has been appointed until judgment or further order, this is practically a new appointment, and further security must be given (*g*).

Chap. I.

The appointment of a receiver operates as an injunction (*h*). An order for an injunction is always in a sense included in an order for a receiver. It is not necessary, if a receiver be appointed, to go on and grant an injunction in terms; but in cases where persons in a fiduciary character have misconducted themselves, the court will often grant an injunction as well as a receiver, not because an injunction is necessary to prevent a party from receiving when a receiver is once appointed, but for the purpose of marking its sense of the conduct of the parties who have misconducted themselves (*i*).

Order for receiver operates as an injunction.

The court may abstain from appointing a receiver on the submission of the defendant to an order to pay moneys into court (*k*) or otherwise (*l*), to deal with moneys as the court shall direct (*m*), or to pay an occupation rent (*n*).

Receiver not appointed on defendant submitting to order.

An order appointing a receiver either should state distinctly on the face of it over what property the receiver is appointed (*o*), or should refer to the pleadings or some

What the order for a receiver directs.

(*g*) *Brinsley v. Lynton Hotel Co.*, W. N. 1895, 53.

hend, 19 Ves. 633; *Palmer v. Vaughan*, 3 Sw. 173.

(*h*) *Tyrrell v. Painton* [1895], 1 Q. B. p. 206, *per* Lindley, L.J.; *Ideal Bedding Co. v. Holland* [1907], 2 Ch. 157; *Ex parte Peak Hill Goldfield* [1909], 1 K. B. 430.

(*l*) *Pritchard v. Fleetwood*, 1 Mer. 54.

(*m*) *Talbot v. Hope Scott*, 4 K. & J. 141.

(*n*) *Porter v. Lopes*, 7 Ch. D. 358; *Real and Personal Advance Co. v. Macarthy*, 27 W. R. 707.

(*o*) *Crow v. Wood*, 13 Beav. 271.

(*i*) *Evans v. Coventry*, 3 Drew. 82.

(*k*) *Curling v. Lord Towns-*

Chap. I.

document in the proceedings which describes the property (*p*). It usually directs the receiver to pass his accounts from time to time, and to pay the balances found due from him, as the judge shall direct (*q*).

If the appointment of a receiver is over real or leasehold estate, the order usually directs the parties to the record who are in possession, not as tenants but as owners, to deliver up to him the possession (*r*), or to attorn tenant to the receiver at an occupation rent (*s*); and an order directing possession to be given to the receiver may, in a proper case, be obtained even upon an interlocutory application (*t*). The appointment of a receiver of the undertaking and assets of a limited company does not, in the absence of specific direction, effectuate a change in the possession of real estate which still remains in the company (*u*).

If tenants are in possession of real or leasehold estates over which a receiver is appointed, the order should direct them to attorn, and pay their rents in arrear and the growing rents to the receiver (*x*), but this direc-

(*p*) Seton, 7th ed. p. 738.

(*q*) *Ib.* For form where receiver is appointed over undertaking and assets of a company, see Seton, 7th ed. p. 735.

(*r*) *Griffith v. Griffith*, 2 Ves. Sen. 401; *Everett v. Belding*, 22 L. J. Ch. 75, 1 W. R. 44; *Hawkes v. Holland*, W. N. 1881, 128; see as to form of order, *Davis v. Duke of Marlborough*, 2 Sw. 108, 116; *Baylies v. Baylies*, 1 Coll. 548; *Edgell v. Wilson*, W. N. 1893, 145.

(*s*) *Re Burchall, Walker v. Burchall*, W. N. 1893, 171.

(*t*) *Ind, Coope & Co. v. Mee*,

W. N. 1895, 8; *Charrington & Co. v. Camp* [1902], 1 Ch. 386. In *Taylor v. Soper*, W. N. 1890, 121, 62 L. T. 828, North, J., refused to make an order for delivery up of possession before trial; but in *Ind, Coope & Co. v. Mee* he said, in explanation of his refusal in *Taylor v. Soper*, that there must have been special circumstances in the last-mentioned case.

(*u*) *Re Marriage, Neave & Co.* [1896], 2 Ch. p. 672; see also Chapter VI., *infra*.

(*x*) Seton, 7th ed. p. 762.

tion should be omitted when the estates are out of England (*y*). Chap. I.

If the property over which a receiver is appointed is outstanding personal estate, the order should direct the parties in possession of such estate to deliver over to the receiver all such estate, and also all securities in their hands for such estate or property, together with all books and papers relating thereto (*z*).

The court, at its discretion, may either deal with the costs of a motion for a receiver at the time of the application (*a*), or order the costs of the application to be costs in the action (*b*). Costs of motion.

The costs of a motion for a receiver are sometimes reserved until the trial (*c*), even although the application is refused (*d*). Where no direction as to costs is given the party making a successful motion is entitled to his costs as costs in the action, but the party opposing is not; where the motion fails the party moving is not, but the party opposing is, entitled to his costs as costs in the action; where the motion is not opposed the costs of both parties are costs in the action (*e*).

(*y*) Seton, 7th. ed. p. 776.

Ch. 572; *Tillett v. Niron*, 25

(*z*) Seton, 7th ed. p. 725;

Ch. D. 238.

Truman v. Redgrave, 18 Ch. D. 547; *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79. If necessary, a receiver will be ordered to keep separate accounts of real and personal estates. *Hill v. Hibbitt*, 18 L. T. 553.

(*c*) *Chaplin v. Young*, 6 L. T. N. S. 97.

(*d*) *Barter v. West*, 28 L. J. Ch. 169; *Coope v. Creswell*, 12 W. R. 299.

(*e*) See *Corcoran v. Witt*, L. R. 13 Eq. 53; comp. *Grimston v. Timms*, 18 W. R. 747, 781. And see Morgan and Wurzburg, pp. 47—55; Annual Practice, n. to Ord. LXV. r. 23.

(*a*) *Goodman v. Whitcomb*, 1 J. & W. 593; *Wilson v. Wilson*, 2 Keen, 249; *Wood v. Hitchings*, 4 Jur. 858.

(*b*) *Hewett v. Murray*, 54 L. J.

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Where a plaintiff proceeds by writ instead of originating summons in a case where he might have proceeded by originating summons, he will be allowed such costs only as he would have been entitled to if he had proceeded by originating summons (*f*).

(*f*) *Barr v. Harding*, 36 W. R. 216 ; *Re Francke*, W. N. 1888, 69 ; 57 L. J. Ch. 437.

CHAPTER II.

IN WHAT CASES A RECEIVER WILL BE APPOINTED.

SECTION 1.—IN THE CASE OF INFANTS.

THE court will, upon a proper case being made out, protect the estate of an infant by appointing a receiver(*a*). Where infants are concerned, the court considers chiefly what would be most beneficial to their interests(*b*). The court will protect the estate of an infant, even against his father(*c*). If an infant has or becomes possessed of an estate, a receiver will be appointed if it appear that his father is insolvent or of bad character, or that there is danger of the rents being lost(*d*). In a case where the mother of infants was dead, and the father was a man of irregular habits who had married his servant, the minors being entitled to real estate in right of their mother, a receiver was appointed(*e*).

It has been held that if there is no testamentary guardian appointed by the testator(*f*), or if the testamentary guardian appointed by the will declines to

(*a*) *Butler v. Freeman*, Amb. 303.

(*b*) *Ramsden v. Fairthrop*, 1 N. R. 389; see, too, *Whitelaw v. Sandys*, 12 Ir. Eq. 393.

(*c*) *Butler v. Freeman*, Amb. 303.

(*d*) *Kiffin v. Kiffin*, cited 1 P. W. 704; *Ex parte Mountfort*, 15 Ves. 449, n.

(*e*) *Re Cormicks*, 2 Ir. Eq. 264.

(*f*) *Hicks v. Hicks*, 3 Atk. 274.

Chap. II.
Receiver
of infant's
estate.

Chap. II.
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act (*g*), a receiver will be appointed on a proper case being made out; but in considering these cases it must be remembered that after the father's death the mother, and after her death her nominees, would be guardians, jointly with persons appointed by the father, by virtue of the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27), with all the powers of guardians under 12 Car. 2, c. 24. The appointment, however, of a testamentary guardian of an infant by his father, under stat. 12 Car. 2, c. 24, does not constitute any objection to the appointment of a receiver of the estate of the infant. The exercise by the father of an infant of the power given by that Act to appoint a testamentary guardian, to whom the statute gives the custody of the profits of the infant's lands, and the management of his personal estate, does not affect the right of the court to appoint a receiver, the guardian having no estate, and the extent of his powers being uncertain (*h*). Guardians appointed by will under the statute, have no more power than guardians in socage, and are but trustees. If it be made to appear that the estate of an infant is likely to suffer by the conduct of his guardian, the court will interpose and appoint a receiver, upon the principles upon which it interposes in the case of trustees and executors (*i*). In a case, accordingly, where the mother of infant children, who had been appointed by her husband executrix and guardian of the children, married

(*g*) *Bridges v. Hales*, Mose. 111.

(*h*) *Gardner v. Blanc*, 1 Ha. 381. In some cases the guardian has been himself appointed receiver. Seton, 7th ed. p. 951.

(*i*) *Duke of Beaufort v. Berty*, 1 P. W. 704; *infra*, p. 17; see, as to order for receiver and injunction, *Brooke v. Cooke*, Seton, 6th ed. p. 731.

a man in necessitous circumstances, a receiver was appointed (*k*). Chap. II.
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SECTION 2.—IN THE CASE OF EXECUTORS AND TRUSTEES.

The court will, upon a proper case being made out, dispossess an executor or trustee of the trust estate by appointing a receiver, but it will not do so upon slight grounds. It is for the testator or creator of the trust, and not for the court, to say in whom the trust for the administration of the property shall be reposed. Though an action be brought by a person having an interest in the estate, it does not follow that the trust created by the testator or settlor is to be set aside (*l*). A strong case must be made out to induce the court to dispossess a trustee or executor who is willing to act (*m*). If there is no danger to property, and no fact is in evidence to show the necessity of interfering by appointing a receiver, the court will not appoint one (*n*). Nor will the court, at the instance of one of several parties interested in an estate, displace a competent trustee, or take the possession from him, unless he has wilfully or ignorantly permitted the property to be placed in a state of insecurity, which due care or conduct would have prevented. It is not enough that the estate may have depreciated in value, and that the incumbrances thereon may have been increasing, if the management of the trustees does not appear to have been improper (*o*). Sect. 2.

Receiver
not
appointed
on slight
grounds.

It is no sufficient cause for the appointment of a

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| <p>(<i>k</i>) <i>Dillon v. Lord Mount-cashell</i>, 4 Bro. P. C. 306.</p> <p>(<i>l</i>) <i>Middleton v. Dodswell</i>, 13 Ves. 268.</p> <p>(<i>m</i>) <i>Smith v. Smith</i>, 2 Y. & C. 361; <i>Bainbridge v. Blair</i>, 4 L. J.</p> | <p>Ch. N. S. 207.</p> <p>(<i>n</i>) <i>Whitworth v. Whyddon</i>, 2 Mac. & G. 52.</p> <p>(<i>o</i>) <i>Barkley v. Lord Reay</i>, 2 Ha. 308.</p> |
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receiver that one of several trustees has disclaimed (*p*); for the disclaimer of one of several trustees does not in law affect the estate of the others, but has the effect of vesting it in them exclusively (*q*); and the testator or creator of the trust must be presumed to know what the legal consequences of the death or disclaimer of some of them must be. Where, accordingly, there are several trustees, the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver without the consent of those who remain (*r*).

Nor is it a sufficient cause for the appointment of a receiver that the trustees or executors are poor or in mean circumstances (*s*), or that being trustees for sale, they have let the purchaser into possession before they received the purchase-moneys, for the court will not necessarily infer this to be misconduct (*t*).

Nor is it a sufficient cause for the appointment of a receiver that one of several trustees is inactive (*u*), or has gone abroad (*x*).

Where an association was carried on as a Friendly Society, but not subject to the restrictions imposed by the Friendly Societies' Acts, and the funds were partly devoted to objects not contemplated by the subscribers and were insufficient to meet obligations, it was held that the relation of trustee and beneficiary existed and a receiver was appointed (*y*).

(*p*) *Browell v. Reed*, 1 Ha. 434; but see *Tait v. Jenkins*, 1 Y. & C. C. C. 492.

(*q*) *Small v. Marwood*, 9 B. & C. 300; *Townson v. Tickell*, 3 B. & Ald. 31.

(*r*) *Browell v. Reed*, 1 Ha. 434.

(*s*) *Anon.*, 12 Ves. 4; *Howard*

v. Papera, 1 Madd. 142.

(*t*) *Browell v. Reed*, 1 Ha. 434.

(*u*) *Ib.*

(*x*) *Ib. per Wigram*, V.-C.

(*y*) *Re One and All Sicknes, &c., Association*, Times Newspaper, 12th, 18th Dec. 1908.

If any misconduct, waste, or improper disposition of the assets can be shown (*z*), or if it appear that the trust property has been improperly managed, or is in danger of being lost (*a*)—*e.g.*, owing to the insolvency of the executor (*b*)—or if it can be satisfactorily established that parties in a fiduciary position have been guilty of a breach of duty, there is a sufficient foundation for the appointment of a receiver (*c*).

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Misconduct, &c.,
a ground
for a
receiver.

Where a portion of a trust fund has been lost, that loss is *primâ facie* evidence of a breach of duty on the part of the trustees, sufficient to authorise the interference of the court by the appointment of a receiver (*d*). So, also, it has been held to be a good ground for the appointment of a receiver that an executor or trustee has omitted to raise a certain sum as, according to the will of his testator, he should have done for the maintenance and education of infant legatees (*e*). “To authorise the court,” said Alderson, B. (*f*), “to appoint a receiver, it is enough to say that the executor has not done what he could to get in the personal estate of the testator; that he has left a considerable portion of it outstanding on improper securities; and that he has not raised a certain sum, as according to the testator’s will he should have done, in

(*z*) *Anon.*, 12 Ves. 4, *per* Sir W. Grant; see, too, *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272.

(*a*) *Middleton v. Dodswell*, 13 Ves. 266, 276; *Colebourne v. Colebourne*, 1 Ch. D. 690.

(*b*) *Gawthorpe v. Gawthorpe*, W. N. 1878, 91; *Re H.’s Estate*, *H. v. H.*, 1 Ch. D. 276.

(*c*) *Evans v. Coventry*, 5 D. M. & G. 918; *Baylies v. Baylies*, 1 Coll. 537; *Brenan v. Preston*, 2

D. M. & G. 839; *Bainbrigge v. Blair*, 3 Beav. 421; *Brooker v. Brooker*, 3 Sm. & G. 475; *Not-hard v. Proctor*, 1 Ch. D. 4; *Hamilton v. Girdlestone*, W. N. 1876, 202.

(*d*) *Evans v. Coventry*, 5 D. M. & G. 918.

(*e*) *Richards v. Perkins*, 3 Y. & C. 307.

(*f*) *Ib.*

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Sect. 2.

order that the parties might know what they had to look to" (g). So, also, a receiver will be appointed if it appear that the trustee have an undue leaning or bias towards one of the contending parties (h). Again, where, in consequence of disputes among the trustees, the payment of rents had been permitted to fall into arrear, a receiver was appointed at the instance of the person entitled to the rents for life (i). "A receiver," said Lord Langdale (k), "must be appointed in order to secure to her the recovery of the arrears of rents and the punctual payment of the accruing rents."

In *Sheppard v. Oxenford* (l), where a man, who had accepted and held moneys for particular persons upon certain trusts, afterwards denied the legality of the trusts on which he held the moneys, the court appointed a receiver.

A creditor in an administration action cannot, unless a case of waste of assets be shown or some other special case be made out, have a receiver appointed merely because the administrator will not admit assets, or has been paying debts and preferring creditors when the estate was insolvent (m). Nor will the court interfere with an executor's legal right of retainer by the appointment of a receiver, in cases where it is not shown that the assets are being wasted (n). The executor's right of retainer

(g) See *Hart v. Tulk*, 6 Ha. 611.

(h) *Earl Talbot v. Hope Scott*, 4 K. & J. 139.

(i) *Wilson v. Wilson*, 2 Keen, 249.

(k) *Ib.* 252.

(l) 1 K. & J. 492.

(m) *Phillips v. Jones*, 28 Sol. J. 360; *Re Harris*, 35 W. R. 710,

56 L. J. Ch. 754. The dictum of Jessel, M.R. to the contrary in *Re Radcliffe, European Assurance Society v. Radcliffe*, 7 Ch. D. 733, cannot be regarded as law; *Re Wells*, 45 Ch. D. 569, 574.

(n) *Re Wells*, 45 Ch. D. 569, approved *Re Stevens, Cooke v. Stevens* [1898], 1 Ch. p. 173.

remains whether the estate is insolvent or not. It is only in cases of improper conduct or danger to the assets reasonably proved that the court will interfere by appointing a receiver (*o*).

Chap. II.
Sect. 2.

If a sole executor or trustee becomes bankrupt, there is a case for the appointment of a receiver (*p*). But if a testator has selected an insolvent debtor as his executor, with full knowledge of his insolvency, the court will not, on the bare fact of the insolvency alone, interfere by appointing a receiver (*q*). The practice, however, of not appointing a receiver where a testator has selected as his executor an insolvent debtor, with knowledge of his insolvency, has not gone so far as to permit a person, against whom there is evidence of insolvency, to prevail against creditors claiming to have the property secured for their benefit, when it is not more than sufficient to pay them (*r*). Nor is it to be inferred from the circumstances of the will having been made some time before the insolvency, and not altered afterwards, that the testator had a deliberate intention to entrust the management of his estate to an insolvent executor (*s*). In *Smith v. Smith* (*t*), the fact that the party who had obtained administration of the testator's real and personal estate was an uncertificated bankrupt, and was not appointed

Bank-
ruptcy, &c.,
of trustee,
when a
ground for
a receiver.

(*o*) *Baird v. Walker*, 35 Sol. J. 56, 90 L. T. 56.

(*p*) *Re Johnson*, L. R. 1 Ch. 325; *Re Hopkins*, 19 Ch. D. 61. Where the trustee in bankruptcy of an executor possesses himself of effects which are vested in the executor as executor only, the court will, if it considers it expedient, appoint a receiver instead of directing

the return of the effects to the executor (see *Williams on Executors*, 10th ed. p. 476).

(*q*) *Gladson v. Stoneman*, 1 Madd. 143 n.; *Stainton v. Carron & Co.*, 18 Beav. 146, 161.

(*r*) *Oldfield v. Cobbett*, 4 L. J. Ch. N. S. 272.

(*s*) *Langley v. Hawke*, 5 Madd. 46.

(*t*) 2 Y. & C. 361.

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Sect. 2.

Poverty,
&c., of
trustee,
when a
ground for
a receiver.

to his office by the testator, but had taken out administration to the widow of the testator, was held not a sufficient reason to induce the court to appoint a receiver before answer, where several of the parties interested declined to join in the application.

Although it is not a sufficient cause for the appointment of a receiver that an executor or trustee is poor or in mean circumstances (*u*), the case is different if an executor or administrator be proved to be of bad character and drunken habits, and in great poverty (*x*). So, where the executrix and guardian of infant children married a man in necessitous circumstances, a receiver was appointed (*y*). So also a receiver was appointed in an old case where a wife was an executrix, and the husband, besides being in indifferent circumstances, was out of the jurisdiction; because, where the husband was out of the jurisdiction, there was no remedy, if the wife wasted the assets (*z*). But if a married executrix, who had been deserted by her husband, had obtained an order for the protection of her property under the 21st section of the Divorce and Matrimonial Causes Act (20 & 21 Vict. c. 85), the court would not interfere (*a*).

Inasmuch, however, as a married woman is now in all respects competent to act as executrix (*b*), and can sue or be sued without joinder of her husband, the above

(*u*) *Supra*, p. 18.

(*x*) *Everett v. Prythergh*, 12 Sim. 368.

(*y*) *Dillon v. Lord Mountcashell*, 4 Bro. P. C. 306.

(*z*) *Taylor v. Allen*, 2 Atk. 213; see *Pemberton v. McGill*, 3 W. R. 557. See also *Yetts v.*

Palmer, 9 Jur. N. S. 954.

(*a*) *Bathe v. Bank of England*, 4 K. & J. 564.

(*b*) See Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), ss. 18, 24, and Married Women's Property Act, 1907 (7 Edw. 7, c. 18), s. 1.

cases are obsolete in so far as they were decided on the ground of the incapacity of married women.

Chap. II.
Sect. 2.

Although it is not a sufficient ground for the appointment of a receiver that one of several trustees has gone abroad (*c*), the case is otherwise if a sole executor resides (*d*) or is abroad, and the beneficiaries under the will are unable to obtain an account from the person left in control of the property during the executor's absence (*e*).

Sole executor abroad.

If all the *cestuis que trust*, or parties beneficially interested in an estate, concur in the application for a receiver, and the trustee consents, the court will make the order (*f*). So, in a case where it appeared that one trustee had disclaimed, and that all the other parties desired it, and the other trustee consented, the court ordered that there should be a receiver (*g*). So, also, in a case where there were two executors and trustees, and one had died and the survivor refused to act, the persons beneficially interested were held entitled to the protection of the court by the appointment of a receiver (*h*). The fact that the deceased trustee advanced money out of his own pocket to an annuitant under the will, in expectation of repayment out of the assets, has been considered to be not a sufficient ground for his representatives to resist the appointment of a receiver, on the assets proving deficient (*i*).

Receiver appointed on consent of parties.

In a case where two out of three trustees chose to act separately, and took securities in their own names, omitting that of the third trustee, a *cestui que trust* was

Other cases in which a receiver will be appointed.

(*c*) *Supra*, p. 18.

Jur. 224.

(*d*) *Westby v. Westby*, 2 Co. C. C. 210.

(*g*) *Beaumont v. Beaumont*, cited 3 Mer. 696.

(*e*) *Dickins v. Harris*, W. N. 1866, 93, 14 L. T. 98.

(*h*) *Palmer v. Wright*, 10 Beav. 237.

(*f*) *Brodie v. Barry*, 3 Mer. 696; see *Bartley v. Bartley*, 9

(*i*) *Palmer v. Wright*, 10 Beav. 237.

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held entitled to a receiver (*k*); and the court will generally grant a receiver, at the instance of the *cestui que trust*, where a single trustee is, or all the trustees are, out of the jurisdiction (*l*). A receiver will also be appointed where the co-trustees cannot act through disagreement among themselves (*m*). So, too, where the trustees had to manage a business and were themselves not qualified to do so, but could not agree in appointing some person as manager, a receiver was appointed (*n*).

In *Tidl v. Lister* (*o*), there had been four trustees, one of whom was dead and another was abroad, and the third had scarcely interfered in the trust: the business of the trust fell almost exclusively on one trustee, and, that trustee consenting, Sir J. Leach considered that he was justified in appointing a receiver (*p*). Similarly a receiver was granted on the misconduct of one of three executors and devisees in trust, the other two consenting to the order (*q*). A receiver will also be appointed when the property of a debtor has been vested in trustees for the benefit of his creditors, and the appointment is necessary for the protection of the property (*r*).

Implied
trusts.

In the case of misconduct by trustees, the court will appoint a receiver as well where the trust arises by implication as where it is expressed (*s*). For example, a tenant for life of leaseholds, who is bound to renew, is

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| (<i>k</i>) <i>Swale v. Swale</i> , 22 Beav. | 1871, 2. |
| 584. | (<i>o</i>) 5 Madd. 433. |
| (<i>l</i>) <i>Noad v. Backhouse</i> , 2 Y. & | (<i>p</i>) 1 Ha. 434, <i>per</i> Wigram, |
| C. C. C. 529; <i>Smith v. Smith</i> , 10 | V.-C. |
| Ha. App. 71. | (<i>q</i>) <i>Middleton v. Dodswell</i> , 13 |
| (<i>m</i>) <i>Bagot v. Bagot</i> , 10 L. J. | Ves. 268. |
| Ch. N. S. 116; <i>Day v. Croft</i> | (<i>r</i>) <i>Waterlow v. Sharp</i> , W. N. |
| (1839), <i>Lewin on Trusts</i> , 12th | 1867, 64. |
| ed., p. 1263. | (<i>s</i>) See <i>Re One and All Sickness</i> |
| (<i>n</i>) <i>Hart v. Denham</i> , W. N. | <i>Association</i> , <i>ante</i> , p. 18. |

clothed with the character of a trustee; and if by his threats or acts he were to manifest an intention to suffer the lease to expire, the court would probably appoint a receiver in order to provide a fund for renewal (*t*). A similar order, for the appointment of a receiver of the rents and profits of an estate for the purpose of accumulating a fund, was made where the tenant for life had fraudulently obtained a sum of stock to which the trustees of the settlement were entitled (*u*).

In a case where a testator had bequeathed the residue of his real and personal estate to his widow, stating in his will that he had done so "in perfect confidence that she will act up to those wishes which I have communicated to her in the ultimate disposal of my property after my decease," the court, being satisfied on the evidence that the bequest had been made on the faith of a promise made by her that she would dispose of the property in favour of the plaintiffs, the natural children of the testator, and that an implied trust was accordingly raised in their favour, granted a receiver of the rents of the real estates, and of the personal estate, on the death of the widow, against the testator's heir-at-law and the second husband of the widow (*x*).

If one of the next of kin of a foreigner obtains administration here, pending proceedings abroad to ascertain who the next of kin are, an action for a receiver can be maintained by a person claiming as next of kin (*y*).

Receiver
pending
proceed-
ings
abroad.

(*t*) See *Bennett v. Colley*, 2 M. & K. 225, at p. 233.

(*u*) *Woodyatt v. Gresley*, 8 Sim. 180.

(*x*) *Podmore v. Gunning*, 7 Sim. 644.

(*y*) *Transatlantic Co. v. Pietroni*, John. 604.

SECTION 3.—PENDING LITIGATION AS TO PROBATE.

During a litigation in the Ecclesiastical Court of probate or administration, the Court of Chancery would entertain a bill for the mere preservation of the property of the deceased till the litigation was determined, and would appoint a receiver, although the Ecclesiastical Court might, by appointing an administrator, have provided for the collection of the effects *pendente lite* (z). It was indeed, a matter of course, where no probate or administration had been granted, for the Court of Chancery to appoint a receiver, pending a *bonâ fide* litigation in the Ecclesiastical Court to determine the right to probate or administration, unless a special case was made out for not doing so (a). In cases where the representation was in contest and no person had been appointed executor or administrator, the court would interfere, not because of the contest, but because there was no proper person to receive the assets (b). But in *Whitworth v. Whyddon* (c), where the person named as executor in the will was in possession of the property of his testator, the court refused to burden the estate with the expenses of a receiver, inasmuch as the property was of trifling value, and no sufficient ground had been shown to warrant the interference of the court.

Appoint-
ment of
receiver
before
Probate by
Chancery
Division.

Under the present practice if there is no *lis pendens*

(z) *Watkins v. Brent*, 1 M. & C. 102; *Wood v. Hitchings*, 2 Beav. 289, on appeal, 4 Jur. 858; *De Feucheres v. Daves*, 5 Beav. 110.

(a) *Rendall v. Rendall*, 1 Ha. 154, *per* Wigram, V.-C.; *Parkin v. Seddons*, L. R. 16 Eq. 36.

(b) *Watkins v. Brent*, 1 M. & C.

102; *Grimston v. Turner*, 18 W. R. 724; W. N., 1870, 93. Before the grant of administration a receiver and manager may be appointed to carry on the business of an intestate; *Blackett v. Blackett*, 19 W. R. 559; *Re Wright*, 32 Sol. J. 721.

(c) 2 Mac. & G. 55.

in the Probate Division and the assets are in jeopardy, the Chancery Division will, in an action for the administration of the estate of the deceased, appoint a receiver pending a grant of probate or letters of administration (*d*). The appointment is an *interim* appointment only, and is usually made to expire within a few days of a grant being obtained (*e*). In order to give the Chancery Division jurisdiction to make the appointment, an action must have been commenced in that Division, and the writ or originating summons ought specifically to claim a receiver (*f*): the person named in the will as executor or the person entitled to take out administration is usually made defendant.

Upon the death of a sole executor against whom an action has been commenced in the Chancery Division for the administration of the estate of his testator, an *interim* receiver will be appointed in such action pending a fresh grant being obtained, if the assets are in peril (*g*). In such cases a receiver will be appointed before (*h*) or after (*i*) judgment, and although there is no living defendant on the record (*k*). Where an intestate died prior to 1898 leaving real estate and personal estate which was

Death of
executor
sole
defendant.

(*d*) *Re Wenge*, W. N. 1911, 129; and see *Re Shephard*, 43 Ch. D. 131; *Macleod v. Lane*, 2 T. L. R. 322; *Re Parker*, 54 L. J. Ch. 695; *Salter v. Salter* [1896], P. 291; *In the goods of Pryse* [1904], P. 304; *Re Clark*, W. N. 1910, 234. Under the old practice it was held that an action to protect and also to administer the estate was irregular, *Overington v. Ward*, 34 Beav. 175.

(*e*) *Re Clark*, W. N. 1910, 234.

(*f*) *Re Wenge*, W. N. 1911, 129.

(*g*) *Re Clark*, W. N. 1910, 234, following *Cash v. Parker*, 12 Ch. D. 293; *Re Shephard*, 43 Ch. D. 131; and see *Mullane v. Aherne*, 28 L. R. Ir. 105.

(*h*) *Re Clark*, W. N. 1910, 234.

(*i*) *Cash v. Parker*, 12 Ch. D. 293.

(*k*) *Re Clark*, *supra*.

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insufficient for payment of his debts, and litigation was pending in the Probate Division relative to the will of his heir, Kekewich, J., on the application of creditors of the original intestate, whose attempt to obtain administration had failed because the personal estate was fully administered, appointed a receiver in an action claiming a declaration that the real estate of the intestate was liable to bear his debts (*l*).

Where, however, an action is pending in the Probate Division relative to the estate of the deceased, the application for a receiver ought to be made in that Division: for the order in such a case is ancillary to the probate proceedings (*m*). It is therefore improper to apply in the Chancery Division where there is a *lis pendens* in the Probate Division (*n*); entering a *careat*, though warned by the executor is not a *lis pendens* (*o*). Pending proceedings in the Probate Division an action for the appointment of a receiver of the testator's real estate was transferred to that Division (*p*).

Receiver
pending
proceed-
ings to
recall
probate.

If probate or administration had been granted, the circumstance that a suit was pending in the Ecclesiastical Court to recall or revoke probate or administration, was not of itself a sufficient ground for the Court of Chancery, as of course, to interfere to prevent the parties to whom probate or administration had been granted, from using those powers which it conferred upon them. If probate or administration had been properly granted, the Court of Chancery would not appoint a receiver pending litigation in the Ecclesiastical Courts to recall or revoke

(*l*) *Re Dawson*, 75 L. J. Ch.
201.

(*m*) *Re Parker*, 54 L. J. Ch.
695; and see *Re Moore*, 13 P. D.
36.

(*n*) *Re Green*, W. N. 1895, 69.
(*o*) *Salter v. Salter* [1896], P.

291.
(*p*) *Barr v. Barr*, W. N. 1876,
44.

probate or administration, unless a special case were made out for doing so (*q*). The general principle was stated by Turner, L.J., in *Devey v. Thornton* (*r*) to be that, where there is a legal title to receive, the court ought not to interfere, unless the legal title is abused, or there is proof that it is in danger of being so. But if a *prima facie* case of fraud were made out (*s*), or if it were made to appear that the legal right to receive the assets was being abused, or was in danger of being abused, whether from insolvency or otherwise (*t*), the court would appoint a receiver. So, also, would it appoint a receiver, if it appeared from all the circumstances of the case that there was no executor or administrator in existence with the right and power to act as such, notwithstanding there was no ground laid for interference in respect of any improper conduct of the parties (*u*). Where, accordingly, an executor, by agreeing with his opponents that the question as to the validity of the supposed testamentary papers should be tried in the suit to recall probate, had treated himself as not being complete executor, a receiver was appointed (*x*). “If,” said Wigram in *Rendall v. Rendall* (*y*), “the question be whether the party claiming to be executor is so *de jure* or not, a receiver will be

(*q*) *Watkins v. Brent*, 1 M. & C. 102; *Newton v. Ricketts*, 11 Jur. 662; *Rendall v. Rendall*, 1 Ha. 154.

(*r*) 9 Ha. 229.

(*s*) *Rutherford v. Douglas*, 1 Sim. & St. 111 n.; *Watkins v. Brent*, 1 M. & C. 102; *Dimes v. Steinberg*, 2 Sm. & G. 75. In order to interfere against the legal title of the executor it is necessary to establish by

evidence strong presumption against the will: *Dew v. Clarke*, 1 Sim. & St. 114; *per* Sir J. Leach.

(*t*) *Ball v. Oliver*, 2 V. & B. 96; *Newton v. Ricketts*, 11 Jur. 662; *Devey v. Thornton*, 9 Ha. 229.

(*u*) *Watkins v. Brent*, 1 M. & C. 97.

(*x*) *Ib.*

(*y*) 1 Ha. 155.

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appointed." So, also, in *Marr v. Littlewood* (z), Lord Cottenham appointed a receiver upon the application of the actual executor, pending a suit to annul probate, upon the ground that the opposing party, by having given notice to the debtors to the estate not to pay to the plaintiff, the actual executor, had destroyed the effect of the probate, and produced by his own act an incapacity on the part of the executor to proceed under the probate in collecting and preserving the assets (a).

Court of
Probate
Act, 1857.

In the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), which abolished the testamentary jurisdiction of the Ecclesiastical Courts, and established a Court of Probate, it was enacted by section 70, that, pending any suit touching the validity of a will, or for obtaining, recalling, or revoking any probate or grant of administration, the Court of Probate might appoint an administrator of the personal estate of the party deceased, and that the administrator so appointed should have all the rights and powers of a general administrator other than the right of distributing the residue of such personal estate (b). The 71st section of the same Act empowered the Court of Probate to appoint a receiver of the real estate of any deceased person pending a suit touching the validity of his will by which his real estate might be affected; and declared that the receiver so appointed should have power to receive the rents and profits of the real estate, and to let and manage the same (c). In order that the Probate Division may have jurisdiction under this Act, there

(z) 2 M. & C. 454.

(a) 1 Ha. 156, *per* Wigram, V.-C.

(b) See, also, 21 & 22 Vict. c. 95, s. 21.

(c) See *Neale v. Bailey*, 23

W. R. 418; see also 21 & 22 Vict. c. 95, ss. 21, 22; and, as to costs of administrator and receiver, *Taylor v. Taylor*, 6 P. D. 29.

must be an actual *lis pendens* before it : the entering of a *carcat*, though warned by the executor, is not sufficient (*d*). Chap. II.
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The court has jurisdiction under sections 70 and 71 to appoint the same person administrator and receiver *pendente lite* of the estates of a person whose sole executor has died, and of such executor, where an action is pending as to the testamentary dispositions of such executor, although there is no litigation pending relative to the estate of the original testator (*e*).

If the deceased died since 1897 a grant *pendente lite* may include both real and personal estate, if the heir has notice (*f*); and in a proper case the citation of the heir may be dispensed with (*g*). The grant terminates with the decree (*h*), or the decision of an appeal therefrom (*i*).

The application is made by motion ; a party to the litigation is not appointed except by consent (*k*). If the parties to the litigation do not agree upon a nominee, the court may refer it to the Registrar to nominate a person to act.

There is nothing in the Court of Probate Act, 1857, which ousts the jurisdiction of the Chancery Division, by which orders appointing a receiver pending a grant are still made if there is no *lis pendens*, and where the assets are in jeopardy (*l*). But if an administrator *ad litem* has

(*d*) *Salter v. Salter* [1896], P. 291.

(*e*) *Shorter v. Shorter* [1911], P. 184; see, however, *Salter v. Salter* [1896], P. 291.

(*f*) *Wiggins v. Hudson*, 80 L. T. 296. If the deceased died prior to 1898 a separate appointment as receiver of real estate is drawn up by the Registrar.

(*g*) *Re Messiter Terry*, 24 T. L. R. 465.

(*h*) *Wieland v. Bird* [1894], P. 262.

(*i*) *Taylor v. Taylor*, 6 P. D. 29.

(*k*) See *Shorter v. Shorter* [1911], P. 184.

(*l*) See *ante*, p. 27.

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been appointed by the Probate Division, the Chancery Division will not appoint a receiver unless a special case can be made out; for the administrator can do everything that is necessary for the protection of the property (*m*).

As soon as the Chancery court finds some one clothed by the Probate court with the character of an administrator, even although he is only appointed *pendente lite*, it will discharge the order for a receiver, and will allow the administrator to receive the estate, but will hold its hand over his dealings with it, and make such orders upon him as it may think proper (*n*).

The Probate court will appoint an administrator *pendente lite*, if it is just and proper to do so, although a receiver has been appointed by the Chancery Division in an action pending between the same parties, and affecting the same property as the testamentary action (*o*). The receiver appointed by the Chancery Division will sometimes be appointed administrator *pendente lite* (*p*); and a grant outright may be made to him, *e.g.*, where the next of kin though cited are unable to find security (*q*), or do not apply for a grant (*r*).

The Court of Probate had, and the Probate Division now has, power under section 70 of the above Act of 1857 to appoint an administrator *pendente lite* in contested testamentary and administration proceedings, on the application of a person not a party to the proceedings.

(*m*) *Veret v. Duprez*, L. R. 6 Eq. 330; *Parkin v. Seddons*, L. R. 16 Eq. 34.

(*n*) *Per* Lord Penzance, L. R. 1 P. & M. 733.

(*o*) *Tichborne v. Tichborne*, L. R. 1 P. & M. 730.

(*p*) *In the goods of T. Evans*, 15 P. D. 215; *In the estate of Claver* [1905], P. 319.

(*q*) *In the goods of G. Moore* [1892], P. 145.

(*r*) *In the goods of Mayer*, 3 P. & M. 39.

In an administration suit, accordingly, which was likely to be protracted, the Court of Probate appointed an administrator *pendente lite* at the instance of a creditor who was not a party to the suit(s). So, also, where the parties to a testamentary suit took no steps to bring it to trial, and an action had been commenced in the Chancery Division in which a receiver had been appointed, the President of the Probate Division, on the application of a creditor not a party to the testamentary suit, appointed an administrator *pendente lite* (t).

Under the old practice where a receiver was sought to protect the estate pending a grant, administration of the estate could not be claimed in the same suit (u). It appears, however, that under the modern practice the writ may claim both a receiver pending a grant (x), and administration after the grant has been made (y).

The court, though it will appoint a receiver to get in a testator's estate in aid of an administrator *pendente lite*, will not appoint a receiver over property of a testator claimed by a party independently of the will, though his title may be impeached on the ground of fraud. Where, pending a contest in the Ecclesiastical Court between the plaintiff and the defendant, as to the validity of two wills, the plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an assignment made by her to the defendant, the court refused to appoint a receiver of the property comprised in the assignment, that

(s) *Tichborne v. Tichborne*,
L. R. 1 P. & M. 730.

(t) *Re Evans*, 15 P. D. 215;
and see *In the Estate of Cleaver*
[1905], P. 319, application made
by plaintiffs in Chancery action.

(u) See *De Feucheres v. Dames*,
5 Beav. 110; *Overington v. Ward*,
34 Beav. 175.

(x) See p. 27, *supra*.

(y) See *per Eve, J.* in *Re Wenge*, W. N. 1911, 129.

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being claimed by the defendant independently of either will (*z*).

A bill praying for a receiver on account of a litigation pending in the Court of Probate was held to be not demurrable, notwithstanding that the receiver was asked for generally, and not merely pending the litigation respecting probate (*a*).

Though a receiver has been appointed during a litigation in the proper court respecting the validity of a will, the court will not, on that account alone, order the person named as executor to pay into court money in his hands belonging to the testator's estate received previously to the appointment of the receiver (*b*).

An action to appoint a receiver pending litigation as to probate or administration should not be brought to a hearing (*c*). A motion, therefore, to dismiss such action for want of prosecution will be refused with costs (*d*). But the court will make a decree by consent for the continuance of the receiver, and for payment of costs, and the investment of the fund in court (*e*). After the litigation is over in the Probate Court, the practice is to discharge the receiver and dispose of the costs; and, if it appears that there was no reasonable ground for instituting the action at all, the court may order the plaintiff to pay all the costs, although a receiver has been appointed (*f*).

(*z*) *Jones v. Goodrich*, 10 Sim. 327; on appeal, 4 Jur. 98.

(*a*) *Major v. Major*, 8 Jur. 797.

(*b*) *Reel v. Harris*, 7 Sim. 639; *Edwards v. Edwards*, 10 Ha. App. 63.

(*c*) *Anderson v. Guichard*, 9 Ha. 275; but see *Carrow v.*

Ferrior, 16 W. R. 841, 1072.

(*d*) *Edwards v. Edwards*, 17 Jur. 826.

(*e*) *Anderson v. Guichard*, 9 Ha. 275.

(*f*) *Barton v. Rock*, 22 Beav. 81, 376.

In *Hervey v. Fitzpatrick* (g) the chief judge of the Gold Coast, as judicial assessor, claimed to be official administrator of a British subject who had died intestate and domiciled there, and to be entitled to a commission for administering his estate. He transmitted part of the assets to this country, and came himself on leave of absence for a short time. The father of the intestate obtained letters of administration, and brought an action against the judicial assessor, praying a receiver. There was no evidence to show any impropriety of conduct on the part of the assessor; but the court held that it had jurisdiction, as the assets and the assessor were both in this country, and, there being danger of his taking the assets again out of the jurisdiction, appointed a receiver until the matter should be adjudicated on at the hearing.

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Receiver
pending
dispute as
to the
adminis-
tration of
the estate
of a British
subject
dying
abroad.

SECTION 4.—IN CASES BETWEEN MORTGAGOR AND MORTGAGEE (h).

Before the Judicature Acts, a mortgagee having the legal estate could not, except under special circumstances, obtain from the Court of Chancery the appointment of a receiver over the mortgaged property, because he could take possession under his legal title (i). But since the Judicature Acts the court will appoint a receiver at the instance of a mortgagee having the legal title. The court does this, not because the mortgagee has in fact

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(g) *Kay*, 421.

648; *Sturch v. Young*, 5 Beav.

(h) Cases between a company
and its incumbrancers are
treated *infra*, p. 62 ff.

557; *Cremen v. Hawkes*, 2 J. &
L. 680; *Ackland v. Gravenor*, 31
Beav. 484; *Pease v. Fletcher*, 1

(i) *Berney v. Sewell*, 1 J. & W.

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less power than he formerly had to take possession, but because there is an obvious convenience in appointing a receiver, so as to prevent a mortgagee from being in the unpleasant position of a mortgagee in possession (*k*).

A legal mortgagee in possession may, if a proper case be made out, have the appointment of a receiver (*l*), but he is not entitled as a matter of course to have a receiver appointed. The court has a discretion as to making the appointment (*m*). A legal mortgagee, who has once taken possession of the mortgaged property, cannot give up possession whenever he likes, and, as a general rule, the court will not appoint a receiver at his instance (*n*).

Prior to the Judicature Act of 1873, it was held that, where an annuity was charged on land, with a power of distress superadded by the statute 4 Geo. II. c. 28, the annuitant could help himself, and was not entitled to the appointment of a receiver (*o*). But, since the Act of 1873, it is conceived that the court has a discretion upon the subject (*p*).

After judgment for foreclosure absolute, the action being at an end, the plaintiff cannot obtain an order for a receiver, even though the conveyance of the foreclosed property has not been settled. In a proper case, however, the court may open a foreclosure, where special circumstances are shown for the reconsideration of the judgment (*q*).

(*k*) *Re Pope*, 17 Q. B. D. 749; Eq. 22; and see *Kelsey v. Kelsey*,
per Cotton, L.J., *Re Prytherch*, L. R. 17 Eq. 495.
42 Ch. D. 590.

(*l*) *Mason v. Westoby*, 32 273; *Mason v. Westoby*, 32
Ch. D. 206. Ch. D. 206; *Re Prytherch*, 42

(*m*) *Re Prytherch*, 42 Ch. D. Ch. D. 590.

590. (*q*) *Wills v. Luff*, 38 Ch. D.

(*n*) *Ib.*

197.

(*o*) *Sollory v. Leaver*, L. R. 9

The court will not appoint a receiver, at the instance of a second mortgagee or equitable incumbrancer, against a prior legal mortgagee in possession, as long as anything remains due to him on the mortgage security. A prior legal mortgagee in possession, having something due to him, is entitled to retain that possession until he is fully paid. A receiver will not be appointed against him except on his own confession that he has been paid off, or on his refusal to accept what is due to him (*r*). If he swears that something is due to him on his mortgage security, no receiver will be appointed against him (*s*), and the only course is to pay him off according to his own statement of the debt (*t*). It is not necessary, in order to preserve his possession, that he should be able to state with great precision what sum is due to him. It is enough if he can swear that something is due to him (however small it may be) on the security (*u*). If he distinctly swears that something is due to him the court will not try the truth of the statement by affidavits against it (*r*). If, however, he will not state that something is due to him, the court will appoint a receiver (*x*). The statement must, in order to satisfy the court, be a distinct and positive statement. It is not enough if it merely amounts to a vague assertion (*y*), or if the mortgagee says in general terms that he believes that, when the accounts

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Receiver
not ap-
pointed
against
prior legal
mortgagee
in posses-
sion at
instance of
second
mortgagee.

(*r*) *Berney v. Sewell*, 1 J. & W. 649.

(*s*) *Quarrell v. Beckford*, 13 Ves. 377.

(*t*) *Berney v. Sewell*, 1 J. & W. 647.

(*u*) *Quarrell v. Beckford*, 13 Ves. 377.

(*v*) *Rowe v. Wood*, 2 J. & W. 558.

(*x*) *Quarrell v. Beckford*, 13 Ves. 377; *Rowe v. Wood*, 2 J. & W. 558.

(*y*) *Hiles v. Moore*, 15 Beav. 181.

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are taken, some particular sum will be found due, without supporting the statement by accounts which will serve to test its truth (*z*). Nor can the incomplete state of his accounts be admitted as an excuse for his not being able to say that something is due to him. If a mortgagee in possession keeps his accounts so negligently that neither he, nor a subsequent incumbrancer, nor the owner of the estate can ascertain what is due, the court may assume that nothing is due, and appoint a receiver (*a*). Time, however, may be given him to make an affidavit of the debt (*b*).

The rule, that a receiver will not be appointed against a prior legal mortgagee in possession as long as anything remains due on the mortgage security, applies equally, whether the priority is original, or has been acquired subsequently by an assignment of the mortgage (*c*). Where, accordingly, as between two equitable incumbrancers, the one later in date has acquired the legal possession, the Court of Chancery would not, at the suit of the one who was prior in date, appoint a receiver (*d*).

The last-mentioned rule, however, only applies as long as anything is due with reference to which the mortgagee has a right to retain possession (*e*). It is not the rule of the court that a third mortgagee, who has advanced his moneys with notice of the second mortgage, and who has taken possession, and has then brought up a first incumbrance, can retain it as against a second mortgagee, after

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| (<i>z</i>) <i>Hiles v. Moore</i> , 15 Beav. 181. | W. 648; <i>Hiles v. Moore</i> , 15 |
| (<i>a</i>) <i>Codrington v. Parker</i> , 16 | Beav. 181; <i>Bates v. Brothers</i> , 17 |
| Ves. 469; <i>Hiles v. Moore</i> , 15 | Jur. 1174; 2 Sm. & G. 517. |
| Beav. 180. | (<i>d</i>) <i>Bates v. Brothers</i> , <i>ubi supra</i> . |
| (<i>b</i>) <i>Codrington v. Parker</i> , 16 | (<i>e</i>) <i>Codrington v. Parker</i> , 16 |
| Ves. 469. | Ves. 469. |
| (<i>c</i>) <i>Berney v. Sewell</i> , 1 J. & | |

the first mortgage has been paid off (*f*). The rule, as to not appointing a receiver against a prior legal mortgagee in possession, has been held to apply in favour of persons in possession entitled to a mortgage and prior charges on the estate, though they had applied part of the rents in payment of the interest on those charges, instead of discharging the principal of the mortgage; it being the proper course, as between the tenant for life and the owners of the inheritance, to keep down such interest out of the rents and not to treat the surplus rents, after payment of the interest of the unpaid part of the principal, as applicable to the discharge of such unpaid principal (*g*).

In order to deprive an equitable mortgagee of his right to a receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits. A mere possession as tenant is not sufficient. An incumbrancer who is in possession, not in that character, but as tenant, cannot set up his possession as tenant as a reason against the appointment of a receiver. In an old Exchequer case, the plaintiff, a second mortgagee, applied for a receiver of the rents of the mortgaged estate. The application was resisted by one of the defendants, who had purchased from the plaintiff part of his mortgage, and was in possession, as tenant, of a portion of the estate, the rent of which was equal to the interest which he was entitled to receive in virtue of his purchase. He contended that to appoint a receiver over the above portion of the estate would be only a useless expense, inasmuch as he would be entitled to receive back as interest what he would have to pay as rent. The

(*f*) *Hiles v. Moore*, 15 Beav. 181.

(*g*) *Faulkner v. Daniel*, 3 Ha. 204 n.; 10 L. J. Ch. 34.

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court, however, considered that he could not unite his two characters of mortgagee and tenant, and that his possession in the latter character could not be set up against the plaintiff's right and title as mortgagee (*h*).

In parti-
cular cases
receiver
appointed
against
legal mort-
gagee in
possession.

Still, although a receiver will not, as a general rule, be appointed against a prior legal mortgagee in possession, the court may, if a case of gross mismanagement of the estate be made to appear, deprive a mortgagee of possession by appointing a receiver; but to warrant such an interference the mismanagement must be of a clear and specific nature (*i*) In *Rowe v. Wood* (*k*), a motion for the appointment of a receiver against a mortgagee of mines, who had become a partner by purchasing shares in them, upon the grounds of mismanagement and exclusion of the mortgagor, was refused; it not being shown, and the mortgagee not admitting, that the mortgage was satisfied. It was held that the rights and duties of a person in that situation were not to be governed solely by principles applicable to one who stands simply in the character of a mortgagee or partner, and that, if a first mortgagee in possession can in any case be deprived of that possession on the ground of mismanagement, it must be mismanagement of a clear and specific nature. The court, however, declared that the plaintiff had a clear right, subject to the equities which might ultimately be declared between the parties, to insist that regular accounts should be kept of all receipts, payments, and transactions relative to the mines, and to have constant access for the purpose of inspecting the accounts; and further that, subject to those equities, he had a clear right to control the

(*h*) *Archdeacon v. Bowes*, 3 553.

Anst. 752.

(*k*) *Ib.*

(*i*) *Rowe v. Wood*, 2 J. & W.

working of the mines, and that, if he was impeded in the exercise of any of those rights, he might come to the court again (l).

Moreover, although an equitable mortgagee or incumbrancer cannot have a receiver appointed against a prior legal mortgagee in possession, the case is different if the prior legal mortgagee is not in possession. If an incumbrancer having a prior legal estate is not in possession, whether from refusing to take possession or from being otherwise out of possession, an equitable incumbrancer holding a charge subsequent in date may have a receiver, without prejudice, however, to the right of the person having a prior legal estate to take possession, if he thinks fit (m).

If a mortgagee will not take possession, a receiver may be appointed without his consent. The court will not allow a prior legal incumbrancer to object to the appointment of a receiver by anything short of a personal assertion of his legal right, and taking possession himself (n). If care be taken that a prior mortgagee is not prejudiced, he has nothing to do with a motion for a receiver. He may enter as mortgagee; and the appointment of a receiver will not prejudice that right. The habit of the court on such a motion is not to look at

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Receiver
appointed
against
prior legal
mortgagee,
if not in
possession.

(l) *Rowe v. Wood*, 2 J. & W. at p. 559.

(m) *Dalmer v. Dashwood*, 2 Cox, 383; *Davis v. Duke of Marlborough*, 2 Sw. 137; *Berney v. Sewell*, 1 J. & W. 648; *Tanfield v. Irvine*, 2 Russ. 151; comp. *Coope v. Creswell*, 12 W. R. 299; see, too, *Langton v. Langton*, 7 D. M. & G. 30, where a receiver was appointed

at the instance of a puisné incumbrancer, and the first legal incumbrancer was not entitled to take possession, because he was by the terms of his security obliged, before doing so, to give three months' notice after default made in payment of the mortgage money.

(n) *Silver v. Bishop of Norwich*, 3 Sw. 114 n.

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mortgagees further than to see that they are not prejudiced (*o*).

The court may, in an action brought by a puisné mortgagee, appoint a receiver, although the first mortgagee has by his deed of security a power to appoint one (*p*).

The appointment of a receiver may be made, at the instance of a puisné mortgagee or other incumbrancer, for the purpose of keeping down the interest, even though the applicant be unable at the time to enforce the usual mortgagee's remedies, as where, for example, he has covenanted not to call in the mortgage debt during a certain time (*q*); or though the security may have been one which gave the creditor no right to be considered as a mortgagee of the estate, but only made the rents a fund for payment of interest and of the premiums upon a policy of insurance, out of the produce of which the principal was to be paid (*r*).

Arrears of
interest a
ground for
receiver.

There is ground enough for granting a receiver at the instance of a second or puisné mortgagee if the payment of interest is in arrear (*s*), or there is reason to apprehend that the property is in peril or insufficient to pay the charges or incumbrances upon it (*t*).

Parties.

Where second or third mortgagees sue for a receiver, it is not necessary to make the first mortgagees parties to the action (*u*).

(*o*) *Norway v. Rowe*, 19 Ves. 153, *per* Lord Eldon.

(*p*) *Bord v. Tollemache*, 1 N. R. 177; and even though he has, unknown to the court, exercised his power, the appointment by the court is valid, *Re Metropolitan Amalgamated Estates*, W. N. 1912, 219.

(*q*) *Burrowes v. Molloy*, 2 J. & L. 521.

(*r*) *Taylor v. Emerson*, 4 Dr.

& War. 122.

(*s*) *Plaskett v. Dillon*, 1 Hog. 201; *Wilson v. Wilson*, 2 Keen, 249; *Hopkins v. Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 447.

(*t*) *Herbert v. Greene*, 3 Ir. Ch. 273; *Moore v. Malyon*, 33 Sol. J. 699; 87 L. T. Newspaper, 316.

(*u*) *Dalmer v. Dashwood*, 2 Cox, 378; *Rose v. Page*, 2 Sim.

A mortgagee of turnpike or other tolls might, under the old procedure, apply to the Court of Chancery for a receiver, instead of taking steps to obtain possession at law (*x*). "Under an ordinary mortgage," said Turner, L.J. (*y*), "the mortgagee when he enters into possession holds for his own benefit. Under a mortgage of this description he becomes, when he enters into possession, liable to the other mortgagees to the extent of their interest. This liability would entitle him, upon possession taken, to come to the court to have it ascertained what is due upon the other mortgages, and for a receiver to aid him in the due application of the tolls; and if this court can be called upon to appoint a receiver immediately after the possession recovered at law, it can hardly be necessary that the proceedings at law should first be taken."

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Mortgagee of tolls, &c., may have a receiver.

A receiver may be appointed on the application of an equitable mortgagee, in a foreclosure or other action for enforcing his security, against the mortgagor in possession and having the legal estate (*z*). So, also, a receiver may be appointed, on the application of an equitable mortgagee by deposit of leasehold property, against a person in possession under an agreement with the mortgagor for an assignment of the latter's interest in the property (*a*). In *Holmes v. Bell* (*b*), a receiver of

Equitable mortgagee may have a receiver.

471; but see *Price v. Williams*, Coop. 31.

(*x*) *Lord Crewe v. Edleston*, 1 D. & J. 93.

(*y*) *Ib.* 109.

(*z*) *Reid v. Midleton*, T. & R. 455; *Aberdeen v. Chitty*, 3 Y. & C. 379; *Meaden v. Sealey*, 6 Ha. 620; *Croove v. Halliday*, 2 Ridg.

P. C. 58. As to when a creditor of a building society is entitled as a secured creditor to a receiver, see *Baker v. Landport, &c. Benefit Building Society*, 56 S. J. 224.

(*a*) *Reid v. Midleton*, T. & R. 455.

(*b*) 2 Beav. 298.

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Sect. 4.

Receiver
over whole
property
at instance
of owner of
a share.

Form of
order for
receiver at
instance of
subsequent
incum-
brancers.

Receiver is
in law the
agent of
the mort-
gagor
within 3 &
4 Will. 4,
c. 27.

the rents and profits of an estate, belonging to the defendants as tenants in common, was appointed at the suit of equitable mortgagees, though one of the mortgagors was out of the jurisdiction, the whole of the rents being received by the other. A receiver may be appointed over the entirety of a mortgaged property at the instance of a mortgagee of an undivided share (*c*).

If a receiver of a mortgaged estate is appointed on behalf of one of several incumbrancers, the order generally contains a declaration to the effect that the appointment of the receiver is to be without prejudice to the rights of, or is not to affect, any prior incumbrancers on the estate, who may think proper to take possession of it by virtue of their respective securities; and it usually directs the receiver, out of the rents and profits to be received by him, to keep down the interest and payments in respect of such incumbrances according to their priorities, and that he be allowed the same in passing his accounts (*d*).

Though a receiver appointed at the instance of mortgagees is an officer of the court, payment by the receiver in pursuance of the order has been held sufficient payment by an agent of the mortgagor within the 40th section of 3 & 4 Will. 4, c. 27 (*e*), to prevent the statute from barring the demand of the mortgagee as to estates included in the security which had been sold by the mortgagor and to rents to which no recourse had been made for payment of interest (*f*).

(*c*) *Sunson v. Cruttwell*, 31 W. R. 399.

(*d*) Seton, 7th ed., pp. 765, 798; see, too, *Lewis v. Zouche*, 2 Sim. 388; *Smith v. Lord Effingham*, 2 Beav. 232; *Under-*

hay v. Read, 20 Q. B. D. 207.

(*e*) See now 37 & 38 Vict. c. 57, s. 8.

(*f*) *Chinnery v. Evans*, 11 H. L. 134; and see *Re Hale, Lilley v. Foad* [1899], 2 Ch. 107,

Where the security contains a power for the mortgagee to appoint a receiver of the mortgaged property (*g*), but the power is not exercised *bonâ fide*, the court may interfere and appoint its own receiver (*h*).

Although a mortgagee may be able, under the Conveyancing Act of 1881 (*i*), to appoint a receiver without coming to the court, it is more desirable, where an action for foreclosure is pending, and the parties are at arm's length, that the appointment should be made by the court (*k*).

If a mortgagee's security includes (either expressly or by implication) not only land, but a business carried on upon the land, the court may, upon his application, appoint a manager as well as a receiver (*l*).

In such cases, if the mortgagee elects to have the receiver also appointed manager, the goodwill of the business forms part of the property entrusted to the receiver, who must, therefore, do all acts necessary to preserve it: he cannot, therefore, without the express permission of the court (which will only be given in special circumstances (*m*)), disregard contracts entered into by the mortgagor, because to do so would result in the destruction of the goodwill (*n*). If, however, the

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Mortgagee
not exer-
cising
power
bonâ fide.

as to receiver appointed out of court, *infra*, p. 328.

(*g*) See *Jolly v. Arbuthnot*, 4 D. & J. 224; *Re Henry Pound, Son, & Hutchins*, 42 Ch. D. 402.

(*h*) *Re Maskelyne British Typewriter* [1898], 1 Ch. 133; and see *infra*, Chapter XIV.

(*i*) See *infra*, Chapter XIV.

(*k*) *Tillett v. Nixon*, 25 Ch. D. 238, in which case the plaintiff, a legal mortgagee in possession, applied to the court by motion

for the appointment of a receiver, and, the mortgagor not asking for a reference to chambers, the court appointed the plaintiff's nominee to be receiver.

(*l*) *County of Gloucester Bank v. Rudry, &c. Colliery Co.* [1895], 1 Ch. 629; and see Chapter XIII.

(*m*) *Re Thames Ironworks*, W. N. 1912, 66; 106 L. T. 674.

(*n*) See *Re Newdigate Colliery Co.* [1912], 1 Ch. 468.

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mortgagee elects to have a receiver only, it appears that the latter may disregard contracts entered into by the mortgagor, because he is under no obligation to preserve the goodwill (*o*).

It seems that, although the court will not appoint a manager of licensed premises at the instance of a mortgagee whose security does not include the goodwill (*p*), it may, where the licences are in jeopardy, authorise the receiver to keep the house open as licensed premises and to do all acts necessary to preserve the licences (*q*).

SECTION 5.—IN CASES BETWEEN DEBTOR AND CREDITOR.

Sect. 5.

Receiver
appointed
at suit of
general
creditor.

General creditors may, like specific incumbrancers, have a receiver of the property of their debtor (*r*), provided they can show to the court the existence of circumstances creating the equity on which alone the jurisdiction arises (*s*). Thus, where it is made to appear that an executor or devisee is wasting the personal or real estate, a receiver may, it is conceived, be appointed at

(*o*) See *Re Newdigate Colliery Co.* [1912], 1 Ch. 468, *per* Cozens-Hardy, M.R., and Moulton, L.J.

(*p*) *Whitley v. Challis* [1892], 1 Ch. 64.

(*q*) See *Charrington v. Camp* [1902], 1 Ch. 386; *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79, where such an order was made on the application of lessors seeking to recover possession.

(*r*) *Owen v. Homan*, 4 H. L. C. 997, where (at p. 1036) the

difference between general creditors, seeking to obtain payment by means of a sort of equitable action of *assumpsit* or debt out of a married woman's separate property, and specific appointees of a portion of that property, was pointed out by the Lord Chancellor; *Oldfield v. Cobbett*, 4 L. J. Ch. N.S. 272; *Largan v. Bowen*, 1 Sch. & Lef. 296.

(*s*) See *Re Shephard*, 43 Ch. D. 131, 138.

the instance of simple contract creditors (*t*). So, where, upon bill by creditors claiming satisfaction out of real and personal assets, it appeared that the real estate must eventually be responsible, as there was no personal estate to be applied to discharge the debts, a receiver was appointed (*u*). So, also, in a case where a bill was filed by creditors for satisfaction out of the personal assets, and, if those were not sufficient, out of the real estate descended to an infant heir, the court appointed a receiver of the real estate (*x*). Independently of the Judicature Act, 1873, where a plaintiff has a right to be paid out of a particular fund, the court will appoint a receiver in order to prevent that fund from being dissipated so as to defeat his rights (*y*).

But, where a judgment debtor is dead, the court will not at the instance of his judgment creditor appoint a receiver of a reversionary interest forming part of the estate of the deceased, as that would be assisting the judgment creditor to get a priority over the other creditors (*z*).

If the real estates over which a receiver is sought are in mortgage, but the mortgagee is not in possession, a receiver will be appointed on the application of creditors, without prejudice to the right of the mortgagee to take possession (*a*).

(*t*) Consider *Keene v. Riley*, 3 Mer. 436.

(*u*) *Jones v. Pugh*, 8 Ves. 71; *Chalk v. Raine*, 13 Jur. 981; see, too, *Coope v. Creswell*, 12 W. R. 299; *Topping v. Searson*, 6 L. T. N. S. 450; *Re Dawson*, 75 L. J. Ch. 201.

(*x*) *Sweet v. Partridge*, 1 Cox, 433; 2 Dick. 696.

(*y*) *Cummins v. Perkins* [1899], 1 Ch. 16, 19, *per* Lindley, M.R.

(*z*) *Re Cave, Mainland v. Cave*, W. N. 1892, 142; *quere Waddell v. Waddell and Craig* [1892], P. 226.

(*a*) *Bryan v. Cormick*, 1 Cox, 422; *Berney v. Sewell*, 1 J. & W. 648, *supra*, p. 41.

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Still, although general creditors may have a receiver of the property of the debtor, a strong case must be made out to warrant the interference of the court. The court will not, unless a clear case is established, deprive a person of property on which the claimant has no specific claim, in order that, if he establishes his claim as a creditor, there may be assets wherewith to satisfy it (b). The anomalous nature of the right when the plaintiff is claiming as a general creditor of a married woman, and is seeking payment out of her separate estate, and the inability of the court to govern the proceedings in equity in such a case by rules strictly conformable to those which regulate an action at law, may warrant the *interim* interference resulting from the appointment of a receiver (c). But the risk of doing a wrong to the defendant in such a case is certainly much greater and more apparent than when a right asserted is a right against some specific fund or estate (d).

Receiver
appointed
at instance
of equitable
creditors.

The doctrine of the court as to entertaining applications for a receiver at the instance of equitable creditors was stated by Lord Eldon in *Daris v. Duke of Marlborough* (e), as follows: "The rule I take to be that the court will, on motion, appoint a receiver for an equitable creditor, or a person having an equitable estate, in this sense without prejudice to persons who have prior legal estates, that it will not prevent their proceeding to take possession if they think proper (f); and with regard to persons having

(b) *Owen v. Homan*, 4 H. L. C. 997, at p. 1036.

(c) See *Cummins v. Perkins* [1899], 1 Ch. 16.

(d) *Owen v. Homan*, 4 H. L. C. 997, at p. 1036.

(e) 2 Sw. 137, 138.

(f) But they must first obtain the leave of the court. *Bryan v. Cormick*, 1 Cox, 422; *Angel v. Smith*, 9 Ves. 335; unless their rights are specially re-

prior equitable estates, the court takes care not to disturb prior equities, and for that purpose directs inquiries to determine priorities among equitable incumbrancers, permitting legal creditors to act against the estates at law, and settling the priorities of equitable incumbrancers. Provided it is satisfied in that stage that the relief prayed by the bill will be given when a decree is pronounced, the court will not expose parties claiming that relief to the danger of losing the rents, by not appointing a receiver of an estate on which it is admitted they cannot enter."

In favour of equitable creditors the court will appoint a receiver over property against which legal creditors might obtain execution. If courts of law hold that certain property may be taken on legal execution, courts of equity cannot consistently hold that it is not to be taken on equitable execution. There is no principle on which, supposing a legal creditor to have the right to take an estate in execution, it should not equally extend to an equitable creditor (*g*). If the estate is in the possession of judgment creditors, and the plaintiff has acquired an estate which, if it had been legal, might have enabled him to turn out the judgment creditors, but, his estate being equitable, he cannot proceed at law, the case is that of an equitable creditor with an estate for securing his debt, applying to the Court in Chancery to have execution given to him there (*h*). The principle on which a receiver was appointed was this: when a bill was filed stating that the plaintiff had an equitable estate, and consequently could not recover at law, but it was clear that he might in equity, the court would appoint a

served by the order appointing the receiver: *Underhay v. Read*, 150.
20 Q. B. D. 209. (*g*) 2 Sw. 132; 2 Wils. Ch. 150.
(*h*) 2 Wils. Ch. 151.

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receiver, not disturbing those entitled to previous beneficial interests (*i*).

In order to obtain the appointment of a receiver, a judgment creditor must show something more than that the debtor has property which cannot be conveniently reached in any other way. He must show that the property is of such a nature that the Court of Chancery had under its original jurisdiction power to attach it for the payment of debts (*k*). Thus the court cannot enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor (*l*), or of the moneys paid by the public for entrance to a theatre (*m*). The court has no jurisdiction to appoint a receiver merely because under the circumstances of the case it would be a more convenient mode of obtaining satisfaction of a judgment than the usual modes of execution (*n*).

A receiver will not be appointed of moneys in the hands of a bailee which can be seized under a *fi. fa.* (*o*), nor of the fees which a director has already earned, because there is a legal mode of execution against them by attachment, nor of his unearned fees, because the effect of making such an appointment might be to destroy the property (*p*). But a receiver may be appointed of the rent of furniture let with a house, and of debentures which have been pledged by the debtor (*q*).

(*i*) 2 Wils. Ch. 154.

infra, p. 57.

(*k*) See *Edwards v. Picard* [1909], 2 K. B. 903.

(*o*) *Morris v. Taylor*, 32 L. R. Ir. 14.

(*l*) *Holmes v. Millage* [1893], 1 Q. B. 551.

(*p*) *Hamilton v. Brogden*, W. N. 1891, 36.

(*m*) *Cadogan v. Lyric Theatre* [1894], 3 Ch. 338.

(*q*) S. C. Where furniture of the debtor was included in a lease by him and his mortgagee of houses, the proportion of the rent attributable to the furniture was ordered to be paid

(*n*) *Harris v. Beauchamp* [1894], 1 Q. B. 801. See further as to special circumstances justifying the appointment,

The court will not appoint a receiver at the suit of an equitable creditor, however clear his claim may be, unless it is satisfied that the property is in danger, or unless there be some other equity upon which to found the application. In a case where a testator had devised his estate to a man for life without impeachment of waste "except voluntary waste in pulling down houses and not rebuilding the same, or others of equal or greater degree," the tenant for life pulled down the mansion-house with the intention of forthwith building a better one on the site, and was proceeding with all reasonable despatch to carry such intention into effect; and it was contended that he was an equitable debtor for the value of the house pulled down, by virtue of the obligation imposed on him by the will to rebuild. There being no pretence for saying that he was not proceeding to fulfil his obligation, the party entitled to the next vested remainder was held not entitled to have a receiver of the rents appointed, in order to secure the rebuilding of the mansion (r).

If a subsequent incumbrancer be in possession of the estate, and a prior legal incumbrancer cannot recover at law by ejectment, by reason of some outstanding prior legal estate, a receiver may be appointed (s). In *White v. Bishop of Peterborough* (t), a case relating to transactions which took place between the years 1805 and 1814, when a judgment creditor might take in execution the profits of a rectory, a sequestration creditor had got possession of the profits of the rectory. The sequestration creditor was in fact the third incumbrancer. The first incumbrance was a demise for years to secure an annuity.

to a receiver for the judgment *thwaite*, 1 D. & J. 504.

creditor, *Hoare & Co. v. Hove* (s) *Silver v. Bishop of Norwich*,
Bungalows, 56 S. J. 686. 3 Sw. 116 n.

(r) *Micklethwaite v. Mickle-* (t) 3 Sw. 109.

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The second incumbrance was also an annuity secured by a term. The sequestration creditor having got into possession, Lord Eldon, on bill filed by the second incumbrancer, held that he was entitled to a receiver, inasmuch as he could not succeed in ejectment, because there was a prior legal estate which might have been set up against him. "Where," said Lord Eldon (*u*), "a creditor of a clergyman seeks to obtain payment of his debt by judgment and sequestration, he is in contemplation of this court in the same state as any other creditor who has taken out execution, and a creditor having taken out execution cannot hold property against an estate created prior to his debt. If by *elegit* one creditor is in possession of one moiety, and another creditor of another moiety, that is good against the creditor; but if there is an antecedent estate, by virtue of which an ejectment may be brought, it does not appear that against that estate the creditors may hold." In the almost contemporaneous case of *Silver v. Bishop of Norwich* (*x*), it was held that the grantee of an annuity, or creditor whose charge was secured by being vested in the trustees of a term, was entitled to a receiver as against judgment creditors, who had obtained possession under writs of *elegit* or sequestration, if there was a legal estate, prior to the term securing the grantee's annuity, which barred him from proceeding at law by ejectment. Lord Eldon intimated that, in such a case, the plaintiff should show on the pleadings the existence of such an estate as would defeat proceedings in ejectment; and that, if it did not appear on the pleadings that ejectment could not be maintained, a receiver would not be appointed (*y*).

(*u*) 3 Sw. 116.

(*x*) 3 Sw. 112 n.

(*y*) *Silver v. Bishop of Norwich*,

3 Sw. at p. 116 n.

Before the Judicature Acts, the Court of Chancery exercised a jurisdiction in aid of judgments at law. A judgment creditor who had sued out a writ of *elegit* or *fi. fa.* on his judgment, but found himself precluded from obtaining execution at law on the ground that the debtor had no lands, goods, or chattels, out of which the judgment could be satisfied at law, had a right to come to the Court of Chancery for the appointment of a receiver of the proceeds of the estate of the debtor which could be reached in equity (*z*). The Court of Chancery, before exercising the jurisdiction, required to be satisfied of two things, first, that the plaintiff in the action had tried all he could to get satisfaction at law; and then, that the debtor was possessed of that particular interest which could not be attached at law (*a*). A judgment creditor, therefore, before coming to the Court of Chancery for the appointment of a receiver, was required to show that he had sued out the writ of *fi. fa.* or *elegit*, the execution of which was avoided, and that the debtor had no lands, goods, or chattels which could be seized on execution at law (*b*). But since the Judicature Act of 1873, which empowers the court to grant a receiver, not only where there is no power to take possession at law, but where there is power to interfere, if it is just and convenient that an order for a receiver should be made, it is not necessary for a judgment creditor who seeks to obtain the appointment of a receiver over the judgment debtor's equitable interest in lands previously to sue out

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Receiver
appointed
by Court of
Chancery
at instance
of judgment
creditors.

(*z*) *Smith v. Hurst*, 1 Coll. 705, 10 Ha. 48; *Smith v. Cowell*, 6 Q. B. D. 75; *Ex parte Charrington*, 22 Q. B. D. 191; see, as to form of order, *Wells v. Kilpin*, L. R. 18 Eq. 299. (a) *Per Jessel, M.R.*, 16 Ch. D. 552; *Re Pope*, 17 Q. B. D. 749. (b) *Smith v. Hurst*, 1 Coll. 705; 10 Ha. 48; *Re Shephard*, 43 Ch. D. 131.

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an *elegit* (*c*); nor is it necessary for a judgment creditor, who seeks to obtain the appointment of a receiver over the judgment debtor's equitable interest in personalty or chattels, previously to issue a *n. fa.* (*d*).

If there are prior or outstanding mortgages, but the mortgagees are not in possession, or refuse to take possession, the court will appoint a receiver of the mortgaged premises at the suit of judgment creditors, without prejudice, however, to the right of mortgagees to take possession, if they think fit (*e*), and the defendant will be ordered to deliver up possession to such receiver (*f*). A judgment creditor, who has obtained equitable execution subject to existing incumbrances, obtains no priority by giving notice to the trustees of the debtor (*g*).

Courts of Bankruptcy have jurisdiction to appoint a receiver by way of equitable execution, for the purpose of enforcing orders for the payment of money to the trustee in bankruptcy (*h*). But such an order will not, as a general rule, be made upon an *ex parte* application (*i*).

The Court of Bankruptcy may, if it is necessary for the protection of the estate, at any time after the presentation of a petition and before a receiving order is made, appoint the official receiver interim receiver of the property of the debtor or any part of it (*k*).

(*c*) *Ex parte Evans*, 13 Ch. D. 260; *Re Pope*, 17 Q. B. D. 749; see, too, *Hills v. Webber*, 17 T. L. R. 513. [1894], 3 Ch. 338, where the passage in the text was cited by Lord Herschell, L.C.

(*d*) *Re Whiteley*, 56 L. T. 846; see, too, *Coney v. Bennett*, 29 Ch. D. 993. (*g*) *Arden v. Arden*, 29 Ch. D. 702; and see *Re Ind, Coope & Co.* [1911], 2 Ch. 223.

(*e*) *Rhodes v. Mostyn*, 17 Jur. 1007; see *supra*, p. 44. (*h*) *Re Gowlie* [1896], 2 Q. B. 481.

(*i*) *Ib.*

(*f*) *Cudogyan v. Lyric Theatre* (*k*) Bankruptcy Act, 1883 (46

A divorced wife who has obtained an order for alimony may have a receiver, like a judgment creditor (*l*).

Where a judgment debtor was entitled as one of the next-of-kin of a deceased intestate, to whom administration had not been taken out, to a share of the personal estate of the deceased, it was held that a judgment creditor was entitled to have a receiver appointed over the share (*m*).

The judgment creditor of a corporation, whose debt originated prior to the Municipal Corporations Act, 1835, was held entitled to have a receiver appointed over the whole corporate property, including land that might have been acquired since the Act (*n*).

The same principle which prevents the assignee of part of a judgment debt from issuing execution at law, namely, because the assignor can only issue execution for the whole debt and cannot put the assignee in any better position than himself (*o*), appears to apply to prevent such assignee from obtaining a receiver by way of equitable execution.

A creditor who has obtained an order for payment of costs, and has endeavoured to obtain a sequestration, but has failed to do so from the conduct of the debtor, is & 47 Vict. c. 52), s. 10 (1). For practice see Bankruptcy Rules 170—175. The official receiver continues to act after the receiving order is made until a trustee is appointed, s. 70 (1). As to his power to appoint a special manager, see s. 12, and p. 302, *infra*.

(*l*) *Oliver v. Lowther*, 28 W. R. 381.

(*m*) *Mullane v. Ahern*, 28 L. R. Ir. 105.

(*n*) *Arnold v. Mayor, &c. of Gravesend*, 2 K. & J. 574; see S. C. 2 Jur. N. S. 706, as to right of mortgagee, after the Act, against receiver appointed at instance of judgment creditor whose debt originated before the Act. The Act of 1835 (5 & 6 Wm. 4, c. 76) was repealed by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

(*o*) *Forster v. Baker* [1910], 2 K. B. 636.

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entitled to apply for a receiver in lieu of sequestration (*p*). So, also, a judgment for the payment of money into court may be enforced by the appointment of a receiver where service of the writ of attachment cannot be effected (*q*).

It was not the practice of the Court of Chancery to appoint a receiver in aid of a judgment at law, unless there was some legal impediment to execution in the ordinary way (*r*). Nor have the Judicature Acts given any right to have a receiver appointed against the estate of a legal debtor, where there is no difficulty in obtaining execution at law (*s*). In the absence of any legal impediment to obtaining execution of the judgment in the ordinary course of law by *n. fa.* or attachment of debts, a receiver will not be appointed, unless there are special circumstances in the case showing it to be just or convenient that a receiver should be appointed. An order can be made for the appointment of a receiver to hold property liable to execution to prevent some one making away with it, or to get in debts where, under particular circumstances, it is a more convenient mode of procuring satisfaction of the judgment than the usual process of attachment. Thus where the judgment debtor was a German company without any assets within the jurisdiction, except debts due and accruing due, and the judgment creditor had no means of ascertaining particulars of such debts sufficient for the foundation of garnishee proceedings, and there was evidence that the judgment

(*p*) *Bryant v. Bull*, 10 Ch. D. 153.

(*q*) *Stanger Leathes v. Stanger Leathes*, W. N. 1882, 71; *Concy v. Bennett*, 29 Ch. D. 993; *Re Pemberton*, W. N. 1907, 118.

(*r*) *Manchester and Liverpool, &c. Banking Co. v. Parkinson*, 22 Q. B. D. 173.

(*s*) *Re Shephard*, 43 Ch. D. 131, *per* Cotton, L.J.

debtor was endeavouring to collect the debts in order to defeat the judgment creditor, a receiver was appointed (*t*): and in special circumstances due to the conduct of the debtor who was joint tenant of three houses, two of which were subject to a mortgage, a receiver was appointed of the debtor's interest in all three houses though no *elegit* had been sued out as regards the third house (*u*). Where, however, there is no impediment shown in the particular case to the realization of the judgment by the ordinary mode of execution at law, it is not just or convenient that a receiver should be appointed (*x*).

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By virtue of section 23 (2) of the Partnership Act, 1890, the High Court or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require (*y*).

Partner-
ship Act,
1890,
s. 23.

By sub-section (4) of the same 23rd section it is provided that the section shall apply in the case of a

(*t*) *Goldschmidt v. Ober-rheinische Metallwerke* [1906], 1 K. B. 373.

(*x*) *Manchester and Liverpool, &c. Banking Co. v. Parkinson*, 22 Q. B. D. 177, *per* Fry, L.J.

(*u*) *Hills v. Webber*, 17 T. L. R. 513.

(*y*) 53 & 54 Vict. c. 39.

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cost-book company, as if the company were a partnership within the meaning of the Act; and by section 7 of the Limited Partnerships Act, 1907 (7 Ed. 7, c. 24), section 23 (2) of the Act of 1890 applies to a limited partnership.

The section has been held to apply to a foreign firm having a branch house in England (z).

A charging order under the section does not make the judgment creditor of the partner a secured creditor under the Bankruptcy Act, 1883 (a). Nor, it is conceived, would an order appointing a receiver have that effect (b).

By R. S. C. Ord. XLVI. r. 1A, every summons under this section is to be served, in the case of a partnership other than a cost-book company, on the judgment debtor and on his partners or such of them as are within the jurisdiction, or, in the case of a cost-book company, on the judgment debtor and the purser of the company.

The court will not necessarily refuse to appoint a receiver until the amount of the applicant's debt has been ascertained. Therefore, where an action by a married woman was dismissed with costs to be paid out of her separate property, and the only separate property of the plaintiff consisted of a share under a will which the trustees were about to pay over to the plaintiff, the court appointed a receiver to receive the share before the costs had been taxed (c).

The powers of equitable execution should not be exercised except in cases where the judgment debt is

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|---|---|
| (z) <i>Brown, Janson & Co. v. Hutchinson & Co.</i> [1895], 1 Q. B. 737. See the judgment of Lindley, L.J., for some valuable observations on the effect of appointing a receiver under the section. | (a) <i>Wild v. Southwood</i> [1897], 1 Q. B. 317. |
| | (b) <i>Re Potts</i> [1893], 1 Q. B. 648, <i>infra</i> , p. 183. |
| | (c) <i>Cummins v. Perkins</i> [1899], 1 Ch. 16. |

sufficiently large to justify this expensive procedure, and the property sought to be charged in execution is not only of a fitting character, but likely to satisfy a reasonable proportion of the debt. In some cases the plaintiff has been appointed receiver, without security, to receive property largely in excess of his judgment debt, subjecting the defendant to serious prejudice and loss. In other cases, receivership orders have been granted over contingent and reversionary interests, whereas the sounder practice would have been to grant orders over that class of property by way of charge only, so as to avoid costs being incurred in settling security, &c., for what is at the moment, if granted, a mere dry receivership (*d*). The following rule of court has accordingly been made, for the purpose of limiting the cases in which a receiver can be appointed. "In every case in which an application is made for the appointment of a receiver by way of equitable execution, the court or a judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment, and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment (*e*).

The following departmental directions were issued on the 19th March, 1887, to the Summons and Order Department of the then Queen's Bench Division, as to orders appointing a receiver by way of equitable execution. They express the usual practice adopted by the judges in

- (*d*) The appointment will not be made at all if it will certainly prove ineffective; *Harper v. M^rIntyre*, 51 S. J. 701.
 (*e*) R. S. C. Ord. L. r. 15A; *Anon.*, W. N. 1884, 63.

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Chambers, as to the appointment of receivers where the judgment debt is small :

“ 1. In all cases where the judgment for debt and costs is for more than £50 and less than £100, a direction is to be added to the order that the total amount to be allowed for the costs of the receiver (including his poundage, the costs of obtaining the appointment, of completing the security, passing his accounts, and obtaining his discharge) shall not exceed 10 per cent. of the amount for which the judgment is signed (*f*). ”

“ 2. Where the judgment for debt and costs is for a less sum than £50, then the usual clause as to security is omitted, and in cases where the receiver is not the plaintiff, the plaintiff is made (by the order) answerable for the acts and defaults of the receiver, but he shall not receive more than the amount of his judgment debt, and allowed costs of obtaining this order without leave of the court or first giving (at the plaintiff's own cost, unless otherwise ordered) the usual security to the satisfaction of the Master. (The leave here referred to can only be given by the judge.) The costs of the order are not to exceed £4. ”

“ *Note.*—In the case of personal property, unless under special circumstances, it is required to be shown that the property of which it is proposed to appoint a receiver cannot be seized under a *fi. fa.* ” (*g*). ”

(*f*) This 10 per cent. rule has been held to apply where a judgment debt of £115 1s. 6*d.* had been reduced by payment to £45 15s. 2*d.* before the receiver was appointed (see Ann. Pr. 1913, p. 854).

(*g*) See further as to practice,

Annual Practice, nn. to Ord. L. r. 16, and *post*, p. 150. If the defendant is a married woman a further paragraph is added to the order limiting the power of the receiver to such of her property as is not subject to a restraint on anticipation.

In appointing a receiver in aid of a legal judgment for a legal debt, the Court of Chancery, it has been very commonly said, granted equitable execution. But the expression is not correct. The appointment of a receiver is not execution, but is equitable relief granted under circumstances which make it right that legal difficulties should be removed out of the creditor's way. What a judgment creditor gets by the appointment of a receiver is not execution, but equitable relief which is granted on the ground that there is no remedy by execution at law : it is a taking out of the way a hindrance which prevents execution at law (*h*).

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This distinction between equitable relief and execution is of importance, because the creditor who applies to have a receiver appointed stands in many respects in a very different position from a creditor who issues execution (*i*). Thus, an order cannot be made appointing a receiver by way of equitable execution after the death of the judgment debtor, even though he was alive when the application was first made (*k*) ; and the executors of a deceased judgment creditor are not entitled to apply for a receiver under Ord. XLII. r. 23, because this does not amount to asking for leave to issue execution within that rule (*l*).

The effect of the Judgments Extension Act, 1868

(*h*) *Re Shephard*, 43 Ch. D. 131, 135 ; *Levasseur v. Mason & Barry* [1891], 2 Q. B. 79. See, too, *Re Marquis of Anglesey* [1903], 2 Ch. 727, at p. 731 ; *Thompson v. Gill* [1903], 1 K. B. 760, at p. 765 ; *Re Bond* [1911], 2 K. B. 988.

(*k*) *Re Shephard*, 43 Ch. D. 131.

(*l*) *Norburn v. Norburn* [1894], 1 Q. B. 448. It appears that the proper course is for the executors to apply to be added as parties under Ord. XVII. r. 4.

(*i*) See, further, *post*, p. 186.

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(31 & 32 Vict. c. 54), is that a decret of the Court of Session in Scotland is, when a certificate of it has been registered under that Act, to be treated as if it had been originally an English judgment; and, therefore, the appointment of a receiver by way of equitable execution may be made upon such a certificate (*m*). The procedure in equitable execution being founded on the equitable and not the common law jurisdiction of the court, the practice in the King's Bench Division should follow that in the Chancery Division as nearly as circumstances will admit. Thus, where a prior incumbrancer applied to have an order appointing a receiver discharged, and for consequent relief, numerous affidavits were filed upon the application, and the matter was referred to a Master of the Queen's Bench Division to report. Upon an application to set aside or vary the report, it was held that the court was bound to consider the objections to the report, and to go into the evidence, and to deal with the report as upon a motion to vary the certificate of a chief clerk (*n*) in the Chancery Division (*o*).

SECTION 6.—IN THE CASE OF COMPANIES.

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Where a mortgage has been made by a railway, canal, or other company of its "undertaking," or the rates, tolls, and dues arising therefrom, the mortgagee may, for the protection of his security, come to the court for a receiver (*p*).

(*m*) *Thompson v. Gill* [1903],
1 K. B. 760, 771.

(*n*) Now a Master.

(*o*) *Walmesley v. Mundy*, 13
Q. B. D. 807.

(*p*) *Fripp v. Chard Railway Co.*, 11 Ha. 241; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 146; *Bowen v. Brecon Railway Co.*, L. R. 3 Eq. 541;

So a man who has sold land to a railway company in consideration of a rentcharge may come to the court for a receiver (*q*). So, also, a mortgagee of turnpike (*r*), dock (*s*), or market (*t*) tolls, has a right to come to the court to have a receiver appointed.

The court has jurisdiction to appoint a receiver at the instance of a mortgagee of tolls, independently of any Act of Parliament (*u*). The appointment of a receiver at the instance of a mortgagee of tolls is one of the oldest remedies of the court (*x*). It is not necessary, in such a case, that there should be an Act giving the court power to appoint a receiver. When an Act of Parliament authorises a mortgage, it authorises, as incidental to it, all necessary remedies to compel payment, and in the case of tolls a power to appoint a receiver (*y*).

The fact that a precise and specific remedy may be pointed out by the Act of incorporation, which provides that persons aggrieved by any order of the managers of the corporate body may appeal to the quarter sessions,

Gardner v. London, Chatham and Dover Railway Co., 15 W. R. 1058.

(q) Eyton v. Denbigh, &c. Railway Co., L. R. 6 Eq. 14, 488.

(r) Knapp v. Williams, 4 Ves. 430 n., *per* Lord Loughborough; *Lord Crewe v. Elleston*, 1 D. & J. 109.

(s) Ames v. Birkenhead Docks, 20 Beav. 342.

(t) De Winton v. Mayor of Brecon, 26 Beav. 533.

(u) Ib.

(x) Hopkins v. Worcester and Birmingham Canal Co., L. R. 6 Eq. 447.

(y) De Winton v. Mayor of Brecon, 26 Beav. 541.

Griffin v. Bishop's Castle Rail-

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does not deprive a party of his right to a receiver ; nor does a proviso in the Act of incorporation, that no action shall be commenced against any person for anything done in pursuance of the Act, until a certain notice has been given, apply to an action for a receiver (*z*), nor does a proviso in the Act of incorporation of a railway company, that a committee of twelve of the proprietors of the company shall be elected at every annual meeting to manage the affairs of the company, deprive a mortgagee of his right to a receiver of the rates, tolls, and dues of the company (*a*). Nor is the jurisdiction to appoint a receiver at the suit of a mortgagee taken away by the fact that there is a provision by statute for the appointment of a receiver through the medium of two justices of the peace (*b*). Nor is it any objection to the appointment of a receiver that the company has duties to perform, the neglect of which might subject it to indictment ; for the order of the court always gives the parties liberty to apply, whereby such consequences may be averted (*c*).

The court will appoint a receiver at the instance of mortgagees or debenture holders of a company formed for the conduct of a public undertaking (*d*), when the

(*z*) *Drewry v. Barnes*, 3 Russ. 104.

(*a*) *Fripp v. Chard Railway Co.*, 11 Ha. 241.

(*b*) *Ib.* 259. By the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), ss. 53, 54, provision is made for the appointment of a receiver at the suit of mortgagees by two justices of the peace. A provision to the same effect is contained

in 10 & 11 Vict. c. 16, ss. 86, 87.

(*c*) *Fripp v. Chard Railway Co.*, 11 Ha. 259.

(*d*) As to what companies fall within this category, see *Re Crystal Palace Co.*, 104 L. T. 898 ; *affd. sub nom. Saunders v. Bevan*, 28 T. L. R. 518. As to the powers of such a receiver, see *Carmichael v. Greenock Harbour Trustees* [1910], A. C. 274.

interest is in arrear(*e*), or when the principal is in arrear, although all interest has been paid(*f*), or where the security is in jeopardy though there is no arrear of principal or interest(*g*). It must, however, be borne in mind that the court will not appoint a manager of the undertaking of a public company, except in cases where the appointment is specifically authorised by statute, as, for instance, cases within section 4 of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127)(*h*).

In a case where a mortgagee of turnpike tolls under an Act of Parliament, which provided that there should be no priority between mortgagees, took possession upon not being paid and retained the whole proceeds in discharge of his own demand, a receiver was appointed(*i*).

A mortgagee of the tolls of a company, seeking to obtain the appointment of a receiver, must sue on behalf of himself and all other mortgagees who have an interest identical with his own, or are in the same class with himself(*k*). A receiver may be appointed in a suit instituted by one of several mortgagees on behalf of himself and all others, though the others do not concur in the application(*l*).

The court will not, at the suit of mortgagees, sanction the appointment of a receiver of a public company, estab-

(*e*) *Bissill v. Bradford Tramways Co.*, W. N. 1891, 51.

(*f*) *Hopkins v. Worcester and Birmingham Canal Co.*, 6 Eq. 447.

(*g*) *Wildy v. Mid Hants Railway Co.*, 16 W. R. 409. As to ordinary limited companies, see *infra*, p. 77.

(*h*) See *infra*, pp. 320, 321.

(*i*) *Dumville v. Ashbrooke*, 3 Russ. 99 (n.).

(*k*) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142; *Fripp v. Chard Railway Co.*, 11 Ha. 241; *Hope v. Croydon Tramways Co.*, 34 Ch. D. 730.

(*l*) *Fripp v. Chard Railway Co.*, 11 Ha. 241.

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lished by the Legislature for a particular object, without providing as far as possible for the future working and continuance of the undertaking sanctioned by the Legislature (*m*). The order will also be without prejudice to the rights of prior incumbrancers.

Receiver of
chattels of
a railway
company.

Even after a receiver of the tolls had been appointed, the Court of Chancery appointed a receiver of the chattel property of a railway company on a motion by a debenture holder, when the company had by a deed assigned its rolling stock and chattels to trustees for the general benefit of creditors (*n*).

Judgment
creditor of
a company
may have
a receiver.

An ordinary judgment creditor of a railway or canal company has a right, as between himself and the company, to go into possession of the land, and, not interfering with the working of the railway or canal, to take the profits realised by its use in the only way in which the responsibilities imposed by the legislature on such companies for the benefit of the public allow them to use it, and in the assertion of that right to have the protection of a Court of Equity, by the appointment of a receiver of the tolls and traffic receipts (*o*).

When the unpaid vendor of land taken by a railway company has commenced an action against the company to enforce his lien, the court will not appoint a receiver

(*m*) *Fripp v. Chard Railway Co.*, 11 Ha. 265; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 147; *Ames v. Birkenhead Docks*, 20 Beav. 350; see, as to the form of the order, *Fripp v. Chard Railway Co.*, 11 Ha. 265, Seton, 7th ed., pp. 736, 755; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 143.

(*n*) *Waterlow v. Sharp*, W. N. 1867, 64.

(*o*) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 145; *Imperial Mercantile Credit Association v. Newry and Armagh Railway Co., &c.*, Ir. L. R. 2 Eq. 531, per Christian, L.J.; *Kingston v. Cowbridge Railway Co.*, 41 L. J. Ch. 152.

before judgment has been obtained in the action, even though the company admit liability (*p*). Chap. II.
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Where a receiver is already in possession, another receiver will not be appointed on the application of another judgment creditor (*q*). But the court may appoint the existing receiver to be receiver of all the property of the company not included in the previous order for the appointment of a receiver (*r*).

As between a judgment creditor and a mortgagee of the undertaking, who had obtained his mortgage before the recovery of the judgment, the right of the mortgagee is paramount (*s*). Accordingly, when a receiver has been appointed at the instance of a mortgagee, his right is prior to the claim of a judgment creditor under an *elegit*, whose whole interest in the land can be that only which subsists subject to the right of the receiver and the provisions of the Railway Acts. Notwithstanding that a receiver may have been appointed at the instance of a mortgagee, a judgment creditor may also have a receiver appointed; but the receiver who has been appointed at the instance of a judgment creditor takes without prejudice to the right of a receiver appointed at the instance of a mortgagee (*t*). The fact that judgment may have

Priorities
between
mortgagee
and
judgment
creditor.

(*p*) *Latimer v. Aylesbury and Buckingham Railway Co.*, 9 Ch. D. 385.

(*q*) *Re Mersey Railway Co.*, 37 Ch. D. 610.

(*r*) *Hope v. Croydon Tramways Co.*, 34 Ch. D. 730.

(*s*) *Legg v. Matthieson*, 2 Giff. 71; *Wildy v. Mid Hants Railway Co.*, 16 W. R. 409, *supra*, p. 54. See, however, *Robinson v. Burnell's Vienna Steam Bakery*

Co., [1904] 2 K. B. 624, where, under the circumstances of the case, the title of judgment creditors to money prevailed over that of a receiver for debenture holders.

(*t*) *Potts v. Warwick and Birmingham Canal Co.*, Kay, 145; *Ames v. Birkenhead Docks*, 20 Beav. 332; *Hopkins v. Worcester and Birmingham Canal Co.*, L. R. 6 Eq. 447. In a case

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been obtained before the appointment of a receiver at the instance of the mortgagee does not vary the rule. If the mortgagee is not in possession by his receiver at the time when execution is issued, the judgment creditor may take the rates and tolls then due; but, as to the rates and tolls thereafter to become due, he will be stopped at any time by the mortgagee entering into possession by his receiver (*u*).

In a case in which a judgment creditor applied for a receiver against a company which had concluded an agreement with another company to work its line, a receiver was appointed without prejudice to the working agreement (*x*).

In determining the respective rights of a mortgagee of a railway, canal, or other undertaking, and a judgment creditor, it is necessary to bear in mind that the effect of a mortgage of a company's undertaking and tolls in accordance with the provisions of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), is to carry the tolls, the unpaid calls, and probably all the property of the company, as proprietors of the undertaking, which any one is at liberty to use on paying toll, but not the

where a judgment creditor under an *elegit* was in possession, and a receiver was afterwards appointed at the suit of a mortgagee, it was ordered that notice of the order should be given to the judgment creditor, and that he should be at liberty, though not a party to the cause, to appear at the hearing of the motion, or to give such notice of motion to discharge or vary the order as he might be advised. *De Winton v. Mayor, &c., of*

Brecon, 26 Beav. 539.

(*u*) See *Ames v. Birkenhead Docks*, 20 Beav. 332, at pp. 348, 352, referring to provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), which have been repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49), and are replaced by R. S. C. Ord. XLV.

(*x*) *Contract Corporation v. Tottenham and Hampstead Junction Railway Co.*, W. N. 1868, 242.

stock or chattels of the company, as carriers of passengers or goods for hire, or the soil of the undertaking itself (*y*). Such a mortgage carries only the tolls and sums of money arising or authorised to be received by virtue of the company's special Act and the Act of 1845, *i.e.*, the profits arising from the use of the undertaking as a going concern (*z*). The mortgage of an undertaking does not carry with it the lands of the company, unless it appears from the deed that it was the intention of the parties that the land should pass. Nor do the mortgage debentures of a railway or other company constitute an equitable charge on the lands of the company, so as to give the holders a right to restrain the sale of the lands by judgment creditors, or any title to the proceeds of the land when sold (*a*). Accordingly, where a railway company, being indebted to contractors for work done, had granted to them, as a security for the debt, a specific charge upon the moneys to arise from the sale of the company's surplus lands, it was held that the holders of mortgage debentures of the company, made in the form given in Schedule C to the above Act of 1845, had no charge upon those lands or the proceeds of the sale of them, but that the assignees of the contractors were entitled to have a receiver of those proceeds appointed (*b*). In an earlier case it had been held that the mortgagee of

(*y*) *Hart v. Eastern Union Ticehurst Gas and Water Co.*, 128
Railway Co., 7 Exch. 265; L. T. Jo. 516.

Eastern Union Railway Co. v. (a) Wickham v. New Bruns-
Hart, 8 Exch. 116. *wick, &c. Railway Co.*, L. R. 1

P. C. 64.

(*z*) *Gardner v. London, Chat-*
ham, and Dover Railway Co.,
L. R. 2 Ch. 201. For form of
(*b*) *Gardner v. London, Chat-*
ham, and Dover Railway Co.,
L. R. 2 Ch. 201.

gas and water company, see *Re*

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the tolls arising from a company's undertaking could not have an injunction and receiver against judgment creditors who were about to take under an *elegit* the lands of the company (c). But a mortgage of a railway company's undertaking includes, it is conceived, the interest of the company in the works, rails, and fixtures as incident to the working of the railway (d). A judgment creditor has been restrained, at the instance of a mortgagee, from taking under his *elegit* the works, rails, &c., incidental to the working of the railway (e).

A company, incorporated by statute, although it has exhausted its borrowing power in creating mortgages of its undertaking, may still create a valid security for an existing debt over all its property that may be taken in execution: and such security will be valid if given to mortgagees who are pressing for payment. A judgment creditor will not therefore be allowed to levy execution on surplus lands or chattels which are included in the security and of which a receiver is in possession (f).

Right of
judgment
creditor
to the
chattels of
a company.
30 & 31
Vict. c.
127, s. 34 ;
38 & 39
Vict. c. 31.

Formerly, under an *elegit*, the chattels and rolling stock of a railway company might, it is conceived, have been seized by a judgment creditor of the company (g). Now, however, the 4th section of the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, made perpetual by 38

(c) *Perkins v. Deptford Pier Co.*, 13 Sim. 277.

(d) *Legg v. Matthieson*, 2 Giff. 71; see *Gardner v. London, Chatham, and Dover Railway Co.*, L. R. 2 Ch. 201.

(e) *Legg v. Matthieson*, 2 Giff. 71.

(f) *Stagg v. Medway Upper*

Navigation Co. [1903], 1 Ch. 169; *Reeve v. Medway Upper Navigation Co.*, 21 T. L. R. 400.

(g) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125; *Bowen v. Brecon Railway Co.*, 3 Eq. 548; *Blackmore v. Yates*, L. R. 2 Ex. 225.

& 39 Vict. c. 31, protects the plant and rolling stock of a railway company from being taken in execution (*h*); but a person who has recovered judgment against a railway company for a sum of money may obtain the appointment of a receiver, and also, if necessary, of a manager of the undertaking of the company, on application by petition in a summary way to the Chancery Division (*i*); and the section further provides that "all money received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking (*k*), be applied and distributed under the direction of the court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein; and, on payment of the amount due to every such judgment

(*h*) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645. The rolling stock and plant of a railway company, whose railway has once been opened for traffic, are protected from being taken in execution even when the traffic on the railway has ceased, in consequence of the railway being in need of extensive repairs and there is no probability that the traffic will be resumed. *Midland Wagon Co. v. Potteries, Shrewsbury and North Wales Railway Co.*, 29 W. R. 78. Where there is in fact no undertaking, as, for instance, where the railway has not been commenced, the Act does not apply, and no receiver will be appointed. *Re Birming-*

ham and Litchfield Junction Railway Co., 11 Ch. D. 155. So, also, where it appeared that the undertaking was being worked at a loss, a receiver was not appointed. *Re Waterford, &c., Railway Co.*, 5 L. R. Ir. 584.

(*i*) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645; see also *Re Beddgelert Railway Co.*, 19 W. R. 427. Applications under the Act are regulated by rules contained in Part II. of an Order of Court, dated the 24th January, 1868, and printed in L. R. 3 Ch. at p. xlii.

(*k*) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645; *Re Mersey Railway Co.*, 37 Ch. D. 610; *Re Eastern and Midlands Railway Co.*, 45 Ch. D. 367.

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creditor as aforesaid, the court may, if it think fit, discharge such receiver or such receiver and manager."

A judgment creditor of a railway company who obtains a receivership order under section 4 of the Act of 1867 does not thereby obtain priority over other creditors (*l*).

In a case in which, after a receiver of the undertaking of a railway company had been appointed under the above 4th section, the company's rolling stock and other chattels were sold to another company under an agreement, confirmed by statute, which directed the purchasing company to pay the purchase-money to the receiver, it was held that the purchase-money constituted money received by the receiver within the meaning of the section; and, further, that the holders of mortgage debentures charging the undertaking of the railway company were entitled, by virtue of section 23 of the same Act of 1867, to a fund representing that money, in priority to unsecured creditors (*m*).

In *Re Wrexham, Mold, and Connah's Quay Railway Co.* (*n*), it was held by the Court of Appeal that costs incurred by the railway company, subsequently to the appointment of a receiver under section 4, in defending an action by a contractor in relation to the construction of the company's line, were not "working expenses of the railway," or "other proper outgoings," within the meaning of the section, but still, having been incurred for the benefit of the debenture holders and other creditors of the company, were payable in priority to any future payments by the receiver to the debenture holders.

(*l*) *Re Mersey Railway Co.*, 37 Ch. D. 610.

(*m*) *Re Liskeard and Caradon Railway Co.* [1903], 2 Ch. 681.
In this case the decision stated

in the text was given upon a petition presented by the receiver.

(*n*) [1900], 1 Ch. 261.

The 4th section of the Act of 1867, though prohibiting execution against the rolling stock of a railway company, does not interfere with the right of a creditor who has recovered judgment against a railway company to apply under section 36 of the Companies Clauses Consolidation Act, 1845, for leave to issue execution against a shareholder of the company who has been appointed receiver, to the extent of any moneys remaining due in respect of his share (*o*).

Where a railway company, which had granted a right of easement over its line to another railway company in consideration of a rent, had recovered judgment against the last-mentioned company for arrears of rent, it was held that a receiver of the tolls of the defendant company, appointed at the instance of the holders of its debenture stock, must pay the rent, as being part of the "working expenses of the railway" within the meaning of the above section 4, before making any payment to the holders of debenture stock (*p*).

The appointment of a receiver is the only remedy open to the holders of mortgage debentures of a railway: the right to foreclosure or sale is denied to them (*q*): but a judgment creditor of a railway company may, under and in accordance with the provisions of the Judgments Act, 1864 (27 & 28 Vict. c. 112), s. 4, as amended by the Land Charges Act, 1900 (63 & 64 Vict. c. 26), have an order for the sale of superfluous lands of the railway company (*r*).

(*o*) *Re West Lancashire Railway Co.*, W. N. 1890, 165; 63 L. T. 56.

(*p*) *Great Eastern Railway Co. v. East London Railway Co.*, 44 L. T. 903.

(*q*) *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

This principle also applies to the holders of debentures of a tramway company governed by the Tramways Act, 1870. *Marshall v. South Staffordshire Tramways Co.* [1895], 2 Ch. 36.

(*r*) See *Re Bishops Waltham Railway Co.*, L. R. 2 Ch. 382,

Right of judgment creditor to have a sale of superfluous lands.

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Statutory
bond holder
as distin-
guished
from a
mortgagee.

The position of a statutory bond holder or debenture holder of a company governed by the Companies Clauses Acts must be carefully distinguished from the position of a mortgagee. A statutory bond or debenture holder is not entitled to an equitable charge on the tolls and traffic receipts of the undertaking, or to have a receiver appointed over such tolls and receipts, for the purpose of paying his claim(s). In *Russell v. East Anglian Railway Co.* (t), where a receiver had been appointed by consent at the suit of a bond holder of a railway company, Lord Truro held that the order for a receiver ought not to have been made, and permitted the execution creditor to levy under his writ of *fi. fa.*, against the goods of the company, notwithstanding the possession of the receiver (u); and there can be no doubt that if the judgment creditor had in that case asked leave to issue an *elegit* against the land of the railway, as well as a *fi. fa.*, the reasoning on which he was held entitled to the one would as well have entitled him to the other (x).

Receiver
appointed
at instance
of statu-
tory bond
holder.

A statutory bond or debenture holder, who has obtained judgment and execution against the company, may bring an action on behalf of himself and all other bond holders for a receiver (y), but he is not bound to bring his action in that form. A statutory bond or debenture holder, who

384; *Ex parte Grissell*, ib. 385; 524.

Re Calne Railway Co., L. R. 9

Eq. 658; *Re Ogilvie*, L. R. 7 Ch.

174; *Re Hull, Barnsley, &c.*,

Railway Co., 40 Ch. D. 119,

120; *Stagg v. Medway (Upper)*

Navigation Co. [1903], 1 Ch.

169, at p. 174.

(s) *Imperial Mercantile Credit*

Association v. Newry and Armagh

Railway Co., &c., Ir. L. R. 2 Eq.

(t) 3 Mac. & G. 151.

(u) See *Bowen v. Brecon Rail-
way*, L. R. 3 Eq. 548.

(x) *Imperial Mercantile Credit
Association v. Newry and Armagh
Railway, &c.*, Ir. L. R. 2 Eq.
539, per Christian, L.J.

(y) Ib. 526, per Christian,
L.J.

has recovered judgment and issued execution against the company, is not a trustee of the moneys he may recover under the execution for himself and all other bond or debenture holders. If he gets paid by the company under his execution before any of the other holders intervene or come into competition with him, he may keep what he has got (z). The proper mode of giving effect to the provisions with respect to non-priority as between bond holders which are contained in the Companies Clauses Consolidation Act, 1845, is conceived to be to let them operate after the bond holders come into competition with each other, but not so as to undo past transactions. The priority spoken of in the 44th section of that Act is not a priority existing by virtue of some or one of the bonds, but a priority to be acquired by execution; in other words, a priority not as between bonds which are not charges at all, but as between executions (a).

The 42nd section of the Companies Clauses Consolidation Act, 1845, limits and diminishes the intrinsic rights of mortgagees, imposing on them the principle of non-priority (b). After an action has been brought by a mortgage debenture holder suing on behalf of himself and all other the mortgage debenture holders, against a company governed by that Act, and a receiver has been appointed, a single mortgage debenture holder, who has recovered judgment against the company on his debenture, is not entitled to issue execution on his judgment otherwise than as a trustee for himself and all other mortgage debenture holders entitled to be paid

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Under
Companies
Clauses Act
of 1845
mortgagees
cannot have
priority as
against
each other.

(z) *Ib.* 543; see, too, *Fountain v. Carmarthen Railway Co.*, L. R. 5 Eq. 324, *per* Lord Hatherley.

(a) See *Ir. L. R.* 2 Eq. 543, *per* Christian, L. J.

(b) *Ir. L. R.* 2 Eq. 534, *per* Christian, L. J.

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pari passu with himself (c). The intent of the Act being that parity of possession shall be given to those who have parity of security, one mortgage debenture holder is not entitled, as soon as he can recover judgment, to acquire an advantage for himself over the other mortgage debenture holders (d). Accordingly, where a receiver had been appointed in a suit instituted on behalf of all the mortgage debenture holders of a railway company, and a judgment was afterwards recovered against the company by one of the mortgage debenture holders, an inquiry was directed whether it would be for the benefit of the debenture holders generally that any proceedings should be taken by the receiver for the purpose of making the judgment available for them (e).

Mortgage
Debenture
Acts.

By the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78), ss. 41, 42, 44, 45, 46, and 47, as amended by the Mortgage Debenture Act, 1870 (33 & 34 Vict. c. 20), on default in payment of interest, or principal money, due on a mortgage debenture issued by a company under those Acts, application may be made to the Chancery Division of the High Court for the appointment of a receiver, and the court may appoint a receiver to act on behalf of the applicant and the other persons entitled to the company's mortgage debentures.

Priority of
mortgagees
and bond-
holders
under
30 & 31
Vict. c. 127.

The priority of mortgagees and bond and debenture stock holders of a railway company against the company, and the property from time to time of the company, over all other claims on account of any debts incurred or engagements entered into by the company after the 20th August, 1867, was declared by the 23rd section of the

(c) *Bowen v. Brecon Railway Co.*, L. R. 3 Eq. 541.

(d) 1b. 550.

(e) 1b. 551; see, too, *Hope v. Croydon Tramways Co.*, 34 Ch. D. 730.

Railway Companies Act, 1867 (30 & 31 Vict. c. 127) (*f*). That section, however, provides that this priority shall not affect any claim against the company in respect of any rent-charge granted or to be granted by the company in pursuance of the Lands Clauses Consolidation Act, 1845, or the Lands Clauses Consolidation Acts Amendment Act, 1860, or in respect of any rent or sum, reserved by or payable under any lease granted or made to the company by any person in pursuance of any Act relating to the company, which is entitled to rank in priority to, or *pari passu* with, the interest on the company's mortgages, bonds, or debenture stock (*g*).

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The court will appoint a receiver of the undertaking and property of an ordinary limited company on the application of debenture holders when the interest (*h*) or principal (*i*) is in arrear, or when, although neither interest nor principal is in arrear, the security is in jeopardy (*k*): as, for instance, where the company

Limited
companies.

(*f*) *Re Cornwall Minerals Railway Co.*, 48 L. T. 41; *Re Eastern and Midlands Railway Co.*, 45 Ch. D. 367.

(*g*) Moreover, the section does not give to a company's debenture holders any lien or charge entitling them to priority of payment out of the proceeds of surplus lands of the company which have been sold on the application of judgment creditors: *Re Hull, Barnsley, &c. Railway Co.*, 40 Ch. D. 119.

(*h*) Even though the principal has not become due; see *Bissell v. Bradford Tramways Co.*, W. N. 1891, 51.

(*i*) Even if no interest is in arrear; see *Hopkins v. Worcester and Birmingham Canal Co.*, 6 Eq. 437. As to when principal becomes due under provisions of debentures, see *Central Printing Works v. Walker*, 24 T. L. R. 88; *Re Tewkesbury Gas Co.* [1911], 2 Ch. 279; affirmed [1912], 1 Ch. 1.

(*k*) *Macmahon v. North Kent Co.* [1891], 2 Ch. 148; *Edwards v. Standard Rolling Stock Syndicate* [1893], 1 Ch. 574; *Thorn v. Nine Reefs*, 67 L. T. 93; *Re Victoria Steamboats* [1897], 1 Ch. 158; *Re London Pressed Hinge Co.* [1905], 1 Ch. 576.

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threatens to dispose of its undertaking, in violation or disregard of the rights of debenture holders (*l*), or where a winding-up is taking place or imminent (*m*).

The court has jurisdiction to appoint a receiver after the money secured by the debentures has become due, although, when the writ was issued, no principal nor interest was in arrear and the security was not then in jeopardy (*n*). In the absence of specific provision in the debentures, there is no default in payment by the company unless the debenture holder gives it an opportunity of paying at its registered office (*o*).

When the debentures or mortgage constitute a charge on the goodwill, the receiver may be appointed manager of the business, in order that the goodwill may be preserved and the entire undertaking sold as a going concern (*p*). In such cases it appears that the debenture holders may elect whether they will have a receiver simply, who would be unable to fulfil the company's contracts, and so destroy the goodwill, besides rendering the company liable in damages, or a receiver and manager, whose duty it would be to carry out such contracts (*q*).

The appointment of a receiver at the instance of debenture holders causes the floating charge created by the debentures to crystallize into a specific charge (*r*).

Effect of
appoint-
ment.

(*l*) *Hubbuck v. Helms*, 56 L. T. 232; *Foster v. Borax Co.* [1899], 2 Ch. 130.

(*m*) *Hodson v. Tea Co.*, 14 Ch. D. 859; *Wallace v. Universal Co.* [1894], 2 Ch. 547; *Re Victoria Steamboats* [1897], 1 Ch. 158.

(*n*) *Re Curshalton Park Estate* [1908], 2 Ch. 62.

(*o*) *Re Escalera Silver Lead Mining Co.*, 25 T. L. R. 87.

(*p*) This topic is treated at length in Chapter XIII. The powers of a receiver who is not appointed manager are dealt with in Chapter VII.

(*q*) *Re Newdigate Colliery Co.* [1912], 1 Ch. 468; and see, further, Chapter XIII., p. 308.

(*r*) See generally as to floating charges, Palmer, Company Law, 10th ed., p. 301.

The receiver takes subject to all specific charges which have been created by the company in priority to the floating charge, unless such specific charges are expressly prohibited by the debentures(s); and also to all rights of set-off acquired by debtors to the company in respect of dealings with it(t). But the title of the receiver prevails over that of execution creditors who have not completed their execution(u), even though the debentures were not issued at the date of the execution if there was then a valid contract for their issue(x). Thus a receiver is entitled as against a person who has obtained a garnishee order, if the debentures were in existence when it was obtained(y), even though the order is made absolute before the receiver is appointed(z).

(s) See as to the nature of floating charges, *Government Stock Co. v. Manila Railway Co.* [1897], A. C. 81; *De Beers Cons. Mines, Ltd. v. British South Africa Co.* [1912], A. C. 52; and *Re Standard Rotary Machine Co.*, 95 L. T. 829.

(t) *E. Nelson & Co. v. Faber* [1903], 2 K. B. 367; and see *Re a Debtor, Ex parte Peak Hill Goldfield, Ltd.* [1909], 2 K. B. 430. Debentures issued by a company at any time before the appointment of a receiver, even after an action has been commenced to enforce the security created by existing debentures, are valid, subject to the provisions of s. 212 of the Companies (Cons.) Act, 1908: *Hubbard v. Hubbard*, 79 L. T. 665.

(u) See *Re Opera, Ltd.* [1891]

3 Ch. 260; *Davey & Co. v. Williamson & Sons* [1898], 2 Q. B. 194; *Re London Pressed Hinge Co.* [1905], 1 Ch. 576; *Evans v. Rival Granite Quarries* [1910], 2 K. B. 979.

(x) *Simultaneous Colour Printing Syndicate v. Foweraker* [1901], 1 K. B. 771; subject to s. 212 of Companies (Cons.) Act, 1908.

(y) *Norton v. Yates* [1906], 1 K. B. 112. In *Geisse v. Taylor* [1905], 2 K. B. 650, it was held by the Divisional Court (*dub.* Kennedy, J.), that the title of the receiver prevailed even over that of a creditor who had obtained a garnishee order absolute before the issue of debentures to a person who had notice of the garnishee order;

For note (z) see next page.

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The holder of a floating security cannot enforce his claim to any specific item of the property over which the charge exists until the security has crystallized (*a*); a receiver should therefore be asked for over the whole of the property comprised in the security, not over any specific item.

The appointment of a receiver for debenture holders is not a special circumstance sufficient to cause the court to depart from its practice of refusing a winding-up order where the petitioner's debt is under 50*l.* (*b*).

Books and
papers.

When debentures charge all the property and assets of a company, including its uncalled capital, the order appointing a receiver usually directs that all books and documents relating to such property and assets be handed over to the receiver. But, if the company is wound up, the liquidator is entitled to the custody of such books and documents as relate to the management and business of the company and are not necessary to support the title of the holder of the debentures, and the court will order the delivery of these books and documents to the liquidator, on an undertaking by him to produce them to the receiver (*c*). The court has no power to order securi-

it is, however, submitted that this case would not now be followed, for it has been held that though a garnishee order does not create a charge it earmarks the debt to answer a particular claim (*per* Lord Macnaghten in *Galbraith v. Grimshaw* [1910], A. C. p. 512), and prevents the person to whom the debt is due from assigning it except subject to the garnishee order (*per* Lord Loreburn, *ib.* p. 511). See also

observations of Farwell and Kennedy, L.JJ., in the same case in the C. A. [1910], 1 K. B. 339, and *Goetz v. Adams* [1874], 2 R. 150.

(*z*) *Cairney v. Back* [1906], 2 K. B. 746.

(*a*) *Evans v. Rival Granite Quarries* [1910], 2 K. B. 979.

(*b*) *Re Industrial Insurance Association*, W. N. 1910, 245.

(*c*) *Engel v. South Metropolitan Frewing Co.* [1892], 1 Ch. 442.

ties which have been deposited in the Land Registry Office to be delivered up to a receiver in a debenture holder's action, unless such securities have been redeemed or sold(*d*). Where title deeds are in the custody of trustees for debenture holders the court may, for reasons of convenience, order them to be handed over to a receiver for the debenture holders on his undertaking to redeliver them; there is no hard and fast rule, the matter being one for the discretion of the court in each case(*e*).

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A person who obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such receiver or manager under the powers of any instrument, must within seven days give notice to the registrar of companies, who thereupon enters the fact on the register of mortgagees(*f*).

Appoint-
ment of
receiver
must be
registered.

SECTION 7.—IN CASES BETWEEN VENDOR AND PURCHASER.

The court will, upon a proper case being made out, interfere upon motion, and appoint a receiver, in cases between vendor and purchaser. Accordingly, where, on a bill impeaching a sale of land on the ground of fraud, and alleging gross inadequacy of consideration and undue influence taken of the ignorance of the vendor, the court was of opinion, from the materials before it, that it was hardly possible the transaction could stand at the hearing, a receiver was appointed in a suit insti-

Sect. 7.

(*d*) *Somerset v. Lands Securities Co.* [1894], 3 Ch. 464.

T. L. R. 11.

(*f*) Companies (Cons.) Act,

(*e*) *Re Ind, Coope & Co.*, 26 1908 (8 Edw. 7, c. 69), s. 94.

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Sect. 7.

tuted against the devisees of the party charged with fraud (*g*). So, also, where it appeared that the defendants had obtained the conveyance of the legal estate from the plaintiff upon a strong suspicion of abused confidence, a receiver was appointed (*h*).

In *George v. Evans* (*i*), where a bill was filed by a *cestui que trust* to set aside a purchase by a trustee from him, a motion for the appointment of a receiver was refused, although the trustee admitted the purchase of the trust property; the ground of the decision being that, though the case was one of suspicion, the court could not interfere until the purchase-deed was actually set aside, no clear evidence having been given to show that the property was likely to perish from the neglect or misconduct of the defendant. But in a suit by the purchaser of a coal mine to rescind the contract on the ground of fraudulent representation, it being essential that the mine should be kept going, the court upon the application of the purchaser appointed a receiver and manager until the hearing (*k*).

If a fair *prima facie* case for the specific performance of a contract is made to appear, the court may interfere upon motion and appoint a receiver (*l*). Accordingly, where a bill alleged that the defendant had taken possession, that he was insolvent, and that he had attempted to sell and convey the estate in question, a receiver was appointed (*m*). So, where an agreement was entered into by the defendant for the sale of an estate to A., the

(*g*) *Stillwell v. Wilkins*, Jac. Eq. 373.
282.

(*h*) *Huguenin v. Baseley*, 13 448; *M'Cloud v. Phelps*, 2 Jur.
Ves. 107. 962.

(*i*) 4 Y. & C. 211.

(*m*) *Hall v. Jenkinson*, 2 V. &

(*k*) *Gibbs v. David*, L. R. 20 B. 125.

purchase to be completed and the purchase-money to be paid on or before the expiration of five years, and in the meantime interest to be paid half-yearly by A., with power to the defendant to avoid the contract in the event of the interest being in arrear for twenty-one days; and the defendant afterwards virtually agreed with the plaintiff, who had advanced money to A. in order to enable him to pay arrears of interest, to extend the term for payment of the half-yearly interest, but notwithstanding the agreement re-entered as for a forfeiture, the court, upon a bill for specific performance, appointed a receiver (*n*). So, also, on the application of the unpaid vendor of land to a railway company, a receiver was appointed (*o*). Again, a receiver was appointed, on the vendor's motion, pending a reference to the Master as to title in a suit for the specific performance of a contract for the sale of an estate, which consisted of buildings and offices on which it would be necessary to effect insurances, and of ornamental grounds which required considerable expenditure and attention (*p*). So, also, a receiver may be appointed against a purchaser in possession, who deals with the land in a manner contrary to former usage, or to the usual course of husbandry, at the instance of the vendor and before judgment for specific performance (*q*). So, also, where, pending a suit instituted by a married woman against her husband, praying for the execution of a post-nuptial settlement and for an injunction to

(*n*) *Dawson v. Yates*, 1 Beav. 301.

(*o*) *Munns v. Isle of Wight Railway Co.*, L. R. 5 Ch. 414; see, too, *Williams v. Aylesbury and Buckingham Railway Co.*, 21 W. R. 819; *Ware v. Ayles-*

bury and Buckingham Railway Co., ib.

(*p*) *Boehm v. Wood*, 2 J. & W. 236.

(*q*) *Osborne v. Harvey*, 1 Y. & C. C. C. 116.

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Sect. 7.

restrain him from selling or incumbering, the husband sold the estate comprised in the settlement to the plaintiffs for valuable consideration, and the plaintiffs thereupon filed a bill, alleging that the settlement was void against them as being voluntary, charging that the defendant was taking advantage of the legal estate to prevent the purchaser proceeding at law, and praying, amongst other things, for a receiver; the court being satisfied upon the pleadings, that the decree would be in favour of the plaintiffs, and that the contract would be enforced, granted the motion for a receiver (*r*). So, also, in an action to enforce specific performance of a parol agreement to execute a bill of sale of personal chattels, the court, being satisfied that there was evidence of immediate danger to the chattels, appointed a receiver (*s*).

In a case where a purchaser was discharged on a report that a good title could not be made out, and there was no fund in court to pay him his interest and costs, a receiver was appointed over the lands, with directions to apply the rents in discharge of his interest and costs (*t*).

A receiver may be appointed under special circumstances before the order for sale has been made absolute (*u*).

Where a purchaser of leaseholds was let into possession before paying the whole of the purchase-money, and he made default in paying the balance of the purchase-money, and the vendor was compelled to pay the rent

(*r*) *Metcalfe v. Pulvertoft*, 1 V. & B. 181.

(*t*) *Hill v. Kirwan*, 1 Hog. 175.

(*s*) *Taylor v. Eckersley*, 2 Ch. D. 302; 5 Ch. D. 741.

(*u*) *Re Stafford*, 31 L. R. Ir. 195.

and taxes in order to avoid a forfeiture, the court appointed a receiver on the application of the vendor (*x*). Chap. II.
Sect. 7.

In an action for specific performance of an agreement to accept a lease of a farm, in which judgment had been given for the defendant, the plaintiff appealed, and the Court of Appeal appointed the plaintiff receiver and manager of the farm without security, as he was afraid that he might be prejudiced if he took possession without the order of the court. And as he would only have to incur expenditure, he was not required to give security (*y*).

SECTION 8.—IN CASES BETWEEN COVENANTOR AND COVENANTEE.

The court will interfere in cases between covenantor and covenantee, and appoint a receiver, where a fair *prima facie* case is made out for the specific performance of the covenant. In a case, for instance, where a tenant in tail in remainder, upon an advance of money to him by the plaintiff, had agreed to repay it after the death or failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and covenanted to levy a fine and suffer a recovery to give effect to the mortgage, but on coming into possession refused to perform his covenant, the court, on bill for specific performance, appointed a receiver of the rents (*z*). Sect. 8.

(*x*) *Cook v. Andrews* [1897], 1 309.
Ch. 266.

(*z*) *Free v. Hind*, 2 Sim. 7.

(*y*) *Hyde v. Warden*, 1 Ex. D.

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Sect. 8.

perform his agreement, and there was an arrear of interest due on the money advanced, on bill for specific performance the motion for a receiver was granted (*a*). So also where, in a case which arose between the years 1811—1817 (when the incumbent of a benefice might charge his benefice), an incumbent duly charged his benefice with an annuity, and covenanted that if he should afterwards be preferred to any other benefice he would charge the same with an annuity to the same amount; but afterwards, on being preferred to another benefice, he refused to fulfil his covenant; the court held that the covenant constituted a good equitable charge, which attached on the new benefice, and granted a receiver (*b*).

The court will interfere, when necessary, to prevent irreparable mischief from breach of covenant, although the property may have to be distributed in bankruptcy, and though the Court of Bankruptcy may be able to give the same relief (*c*). Accordingly, where inspectors appointed by a deed of inspectorship, registered under the Bankruptcy Act, 1861, filed a bill against the debtor alleging that he was dealing with his assets in a manner contrary to the covenants of the deed, that they were unable to prevent his proceedings, and that irreparable mischief would result from them, a receiver was appointed (*d*).

(*a*) *Shakel v. Duke of Marlborough*, 4 Madd. 463. 553.

(*c*) *Riches v. Owen*, L. R. 3

(*b*) *Metcalf v. Archbishop of York*, 6 Sim. 225; 1 M. & C. Ch. 821.

(*d*) *Ib.*

SECTION 9.—IN CASES BETWEEN TENANT FOR LIFE
AND REMAINDERMAN.

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If a tenant for life does not keep down the interest of mortgages, and other incumbrances on the estate, the remainderman may apply to have a receiver appointed, with power to keep down the interest, remitting to the tenant for life the surplus rents (*e*).

Whether, as against a legal tenant for life of renewable leaseholds, the court will appoint a receiver for the purpose of providing renewal fines, will primarily, it is conceived, depend upon whether the tenant for life is or is not, by the terms of the will or settlement, under an obligation to renew. If he is his conduct may be such as to justify the appointment; but if he is not, it is conceived that the court will decline to interfere (*f*).

Where leasehold houses are vested in trustees on behalf of a tenant for life and remainderman, and the tenant for life is allowed by the trustees to receive the rents but does not keep the houses in a proper state of repair according to the covenants in the lease, the court will at the instance of the trustees appoint a receiver of the rents, for the purpose of enforcing the proper repair of the houses (*g*).

Where a testator devised his estates to A. B. for life without impeachment of waste, "except voluntary waste in pulling down houses and not rebuilding the same or others of equal or greater value," and A. B. pulled down

(*e*) 1 Sch. & Lef. 407; see, *Micklethwait v. Micklethwait*, 1 De G. & J. 504, at pp. 511, 530; too, *Gresley v. Adderley*, 1 Sw. 579; *Bertie v. Lord Abingdon*, 3 Mer. 560; *Shore v. Shore*, 4 Drew. 501. and *Bennett v. Colley*, 2 M. & K. 225, at p. 233.

(*g*) *Re Fowler*, 16 Ch. D. 723.

(*f*) See *per* Turner, L.J., in

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Sect. 9.

the mansion-house with the intention of building a better on the site, and was proceeding with all reasonable despatch to carry that intention into effect, it was held that the person entitled to the next vested remainder was not entitled to have a receiver of the rents appointed in order to secure the rebuilding of the mansion (*h*).

Where there was a limitation of a term to raise portions for younger children, and subject thereto the estate was limited to A. B. for life, with remainder over, and a decree had been made to sell the term for raising portions, but A. B. would not produce the title-deeds, so that it was impossible to make out the title and proceed to a sale, an order was made for the appointment of a receiver of the rents and profits of the estate (*i*).

In *Upton v. Brown* (*k*), where a business had been carried on during the lives of two tenants for life by a receiver, and there had been a loss during the life of the first tenant for life, but a profit during the life of the second tenant for life, it was held that the loss should be made good out of the subsequent profits and not out of capital.

SECTION 10.—IN PARTNERSHIP CASES.

Sect. 10.
Principles
on which a
receiver is
appointed.

Where an application is made for a receiver in partnership cases, the court is always placed in a position of very great difficulty: on the one hand, if it grants the motion, the effect of it is to put an end to the partnership, which one of the parties claims a right to have continued; and, on the other hand, if it refuses the

(*h*) *Micklethwait v. Mickle-* Madd. 47.
thwait 1 De G. & J. 504. (*k*) 26 Ch. D. 588.
(*i*) *Brigstock v. Mansel*, 3

motion, it leaves the defendant at liberty to go on with the partnership business at the risk, and probably to the great loss and prejudice, of the dissenting party. Between these difficulties it is not very easy to select the course which is best to be taken, but the court is under the necessity of adopting some mode of proceeding to protect, according to the best view it can take of the matter, the interests of both parties (*l*).

In granting or refusing an order for a receiver in partnership cases, the court does not act on the same principles on which it grants or refuses an order for an injunction. In granting a receiver of a partnership, the court takes the affairs of the partnership out of the hands of all the partners, and entrusts them to a receiver or manager of its own appointment. In granting an injunction, the court does not take the affairs of the partnership into its own hands, but only restrains one or more of the partners from doing what may be complained of. The order for a receiver excludes all the partners from taking any part in the management of the concern; the order for an injunction merely restrains one of the partners who may have acted in breach of the partnership articles, or may have otherwise misconducted himself, from continuing to act in the way complained of (*m*). It therefore does not follow that because the court will grant an injunction, it will also appoint a receiver, or that because it refuses to appoint a receiver, it will also decline to interfere by injunction (*n*). In every case where com-

(*l*) *Madgwick v. Wimple*, 6 Beav. 500; *per* Lord Langdale; see, too, *Blakeney v. Dufaur*, 15 Beav. 42; *Sargant v. Read*, 1 Ch. D. 600.

(*m*) See *Hall v. Hall*, 3 Mac.

& G. at p. 86.

(*n*) See *Hartz v. Schrader*, 8 Ves. 317; *Hall v. Hall*, 12 Beav. 414, 3 Mac. & G. 79, where, although an injunction was granted, a receiver was refused.

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plaints are made of breaches of partnership articles, it must be seen whether the complaints are urged with a view of making them the foundation of a dissolution, or of a judgment enforcing and carrying on the partnership according to the original terms, and preventing, by proper means, the recurrence of those breaches which have before happened by reason of the conduct of one of the parties (*o*).

Receiver
not ap-
pointed
unless a
dissolution
be sought.

It is not according to the practice of the court, where the object of the action is not to obtain a dissolution of a partnership, but, on the contrary, to continue the partnership, to grant, in the course of that action, the appointment of a receiver and manager (*p*). The court does not interfere for the management of a partnership, except as incidental to the object of the action, to wind up the concern and divide the assets (*q*). If the court were not to adopt such a rule, it might be called upon to make itself the manager of every trade in the kingdom (*r*).

Cases, however, may arise in which a partner is so conducting himself that, unless a manager is appointed before the hearing, the partnership concern may in the meantime be destroyed. In such case the court will appoint an interim receiver and manager (*s*). A receiver would also, there is no reason to doubt, be appointed, although the dissolution of the partnership were not sought, in a case where the question was one of the receipt of money only, and where, if the money were

(*o*) *Hall v. Hall*, 3 Mac. & G. 13.
79, at p. 87.

(*p*) *Goodman v. Whitcomb*, 1 J. & W. 589; *Hall v. Hall*, 3 Mac. & G. 79; *Roberts v. Eberhardt*, Kay, 148.

(*q*) *Waters v. Taylor*, 15 Ves.

(*r*) *Goodman v. Whitcomb*, 1 J. & W. 592; *Roberts v. Eberhardt*, Kay, 148.

(*s*) *Hall v. Hall*, 3 Mac. & G. at p. 91.

allowed to be received by the parties, it would not be applied to its proper purposes, and thus at the trial there would be a failure of justice, unless the court interposed in the meantime (*t*). So, also, the court will appoint a receiver in the case of a dispute between partners, so as to secure the property until that dispute can be settled, although there is no claim for a dissolution (*u*).

In *Const v. Harris* (*x*), Lord Eldon said that a receiver might be appointed in a suit where a decree could be made for carrying on the concern according to the terms of some specific instrument, which by the agreement of the parties was to regulate the mode of its being carried on, as well as in a suit for wholly putting an end to the concern ; and a receiver was appointed in that case although a dissolution was not sought by the bill. The case itself was a peculiar one. The proprietors of a theatre had executed a deed by which they covenanted and agreed that the profits of the theatre should be exclusively appropriated to particular purposes, and that the treasurer for the time being should be irrevocably directed so to apply the profits. Some years afterwards the parties entitled to seven-eighths of the theatre entered into an agreement which provided in some respects for a different application of the profits and otherwise affected the rights of a party interested in the remaining one-eighth, who was not consulted on the subject ; and, upon the application of that party for the specific performance of the covenants and agreements of the original deed, a receiver was appointed. The receiver was a receiver

(*t*) *Hall v. Hall*, 3 Mac. & G. 1882, 121 ; 47 L. T. 250.
at p. 90. (*x*) T. & R. 517.

(*u*) *Medwin v. Ditchman*, W.N.

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wholly unconnected with the management. His office was purely a ministerial one. He was to receive all that persons paid for their entrance to the theatre, and to apply it according to certain terms and provisions which the parties themselves had agreed on (*y*).

It is not
necessary
that the
writ should
claim a
dissolution.

It is not necessary, in order to induce the court to appoint a receiver, that the writ or statement of claim should expressly claim a dissolution. It is enough that it be plain that it is necessary to put an end to the concern (*z*). If such be the case, the case stands upon precisely the same basis as if the action had been brought exclusively for the purpose of the dissolution and the winding-up of the concern (*a*). The court will, in all cases, entertain an application for a receiver, if the object of the action is to wind up the partnership affairs, and the appointment of the receiver is sought with that view. Thus, in *Sheppard v. Oxenford* (*b*), a bill was filed by a shareholder in the National Brazilian Mining Company, on behalf of himself and other shareholders, against the defendant, its sole director and manager, praying for an account of moneys received and paid by the directors on behalf of the association, and of its debts, and the payment thereof out of the assets of the company, and for a division of the profits among the shareholders. The bill also prayed for an injunction to restrain the defendant from selling the property, and for a receiver to get in the debts owing to the company, and all remittances made to it from abroad, and generally to conduct the business and affairs of the association, until the accounts should be taken. No dissolution was expressly asked for, but the

(*y*) See *Hall v. Hall*, 3 Mac. C. 619.
& G. 90.

(*a*) *Hall v. Hall*, 3 Mac. & G. 89.

(*z*) *Wallworth v. Holt*, 4 M. & (b) 1 K. & J. 491.

whole object of the suit evidently was to wind up the company, and have its assets applied in liquidation of its liabilities; and on a motion by the plaintiff for an injunction and a receiver, an injunction was granted, and a receiver and manager was appointed as prayed by the bill. The defendant, who had gone out to Brazil after the bill had been filed, was appointed receiver and manager out there (c).

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Again, in *Evans v. Coventry* (d), the members of two societies, or rather, it would seem, of one society having two branches of business, viz., a loan branch and an insurance branch, filed a bill for the purpose of having the funds of the societies made good by the defaulting directors, and of having the accounts investigated, the affairs of the societies wound up, if necessary, and their assets in the meantime protected by the appointment of a receiver and manager. It was proved that some of the funds had already been made away with by the secretary; and a receiver and manager was appointed by the Court of Appeal to protect what remained until the hearing of the cause, upon the ground that the plaintiffs had an interest in the funds in question, and that the funds were in danger of being lost. It does not appear very distinctly what the receiver and manager was expected to do in his capacity of manager. The Vice-Chancellor had refused the motion mainly on the ground that he could not take upon himself the management of such societies even until the hearing of the cause. The Court of Appeal did not allude to this.

The mere fact that the plaintiff in a partnership action may claim a dissolution is not a sufficient ground for the

The mere fact that the plaintiff claims a dissolution

(c) *Sheppard v. Oxenford* at p. 501. (d) 5 D. M. & G. 911, reversing 3 Drew. 75.

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is not
enough,
unless
there be a
case for
dissolution.

appointment of a receiver, unless such a state of facts is shown as will, if proved at the trial, entitle the plaintiff to a judgment for dissolution (*e*). The court will not, upon motion, appoint a receiver, unless it sees that there is an actual present dissolution arising from the acts of the parties, or foresees that at the trial it will dissolve the partnership. If there has been neither misconduct, nor any such violation of the articles as to entitle the plaintiff to a dissolution, a receiver will not be appointed (*f*). If, however, the court sees its way to a dissolution at the trial, there is a case for a receiver (*g*).

If the case made stands in such a state that the court cannot see whether there will or will not be a judgment for dissolution at the trial, "it will not take into its own hands the conduct of a partnership, which only may be dissolved" (*h*).

If the partnership is a continuing one and may continue, a receiver will not be appointed. If partners agree upon a term for the partnership to continue, neither partner can dissolve the partnership until the end of the term. But if there be misconduct, the court can and will appoint a receiver before the expiration of the term, and will make the appointment on an interlocutory application. But the case then made must not be one raising merely a question whether there is or is not misconduct as between the partners. The court must, especially if there be no term, see its way to a dissolution at the trial (*i*). The question whether there is or is not a

(*e*) *Goodman v. Whitcomb*, 1 J. & W. 589; *Smith v. Jeyes*, 4 Beav. 503; *Roberts v. Eberhardt*, Kay, 148.

(*f*) *Baxter v. West*, 28 L. J. Ch. 169.

(*g*) *Marsden v. Kaye*, 30 L. T. 197.

(*h*) *Goodman v. Whitcomb*, 1 J. & W. at p. 592.

(*i*) *Baxter v. West*, 28 L. J. Ch. 169; see *Bailey v. Ford*, 13

term is a question properly determinable at the trial, and is not one that the court will try on an interlocutory application. If there is not sufficient evidence to enable the court upon the interlocutory application to say that at the trial it will appear there was a term, a receiver will not be appointed (*k*).

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Where a partnership is dissolved by the issue of the writ, the mere fact of dissolution does not entitle the plaintiff as of right to the appointment of a receiver (*l*), although, if the partnership is already dissolved, the court usually appoints a receiver almost as a matter of course (*m*).

The court will not, as a matter of course, appoint a receiver of the partnership assets, even where a case for dissolution is made (*n*). The very basis of a partnership contract being the mutual confidence reposed in each other by the parties (*o*), the court will not appoint a receiver in an action between the members of a partnership firm, unless some special ground for its interference is established (*p*). It must appear that the member of the firm against whom the appointment of a receiver is sought has done acts which are inconsistent with the duty of a partner, and are of a nature to destroy the mutual confidence which ought to subsist between the parties (*q*).

Receiver
not ordered
in every
case where
a case for
dissolution
is made.

Sim. 495; *Bowker v. Henry*, 6 L. T. N. S. 43.

281; *Fairburn v. Pearson*, 2 Mac. & G. 145.

(*k*) *Baxter v. West*, 28 L. J. Ch. 169; see S. C. at the hearing, 1 Dr. & Sm. 175.

(*o*) *Phillips v. Atkinson*, 2 Bro. C. C. 272; see, too, *Peacock v. Peacock*, 16 Ves. 51.

(*l*) *Pini v. Roncoroni* [1892], 1 Ch. 633.

(*p*) *Harding v. Glover*, 18 Ves. 281.

(*m*) *Ib.* at p. 637.

(*q*) *Smith v. Jeyes*, 4 Beav. 505.

(*n*) *Harding v. Glover*, 18 Ves.

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A receiver may be appointed in an action for dissolution, notwithstanding a reference of disputes to arbitration (*r*), and the court will, by one and the same order, appoint a receiver and stay all proceedings in the action except for the purpose of carrying out the order for a receiver (*s*).

Death or
bankruptcy
of one
member of
a firm not
a ground
for a
receiver.

The death or bankruptcy of one of the members of a firm is not of itself a ground for the appointment of a receiver, as against the surviving or solvent partner or partners. The mutual confidence which the members of the firm reposed in each other at the date of the contract, and which formed the very basis of the partnership contract, is not, as regards the surviving or solvent partner or partners, affected by the death or solvency of one of the members of the firm (*t*). If a partner dies (*u*), or becomes bankrupt (*x*), a right to wind up the partnership concern and collect the assets is by law vested in the surviving (*y*), or solvent (*z*) partner or partners, as the case may be. Before the court will interfere and appoint a receiver, some breach or neglect of duty on their part must be established (*a*).

If it is more convenient that the affairs of the partnership should be wound up in bankruptcy, the court will

(*r*) *Halsey v. Windham*, W. N. 385.

1882, 108; *Compagnie du Sénégal v. Woods*, W. N. 1883, 180; 33 L. J. Ch. 166.

(*s*) *Pini v. Roncoroni* [1892], 1 Ch. 633.

(*t*) See *Phillips v. Atkinson*, 2 Bro. C. C. 272.

(*u*) *Collins v. Young*, 1 Macq. 385.

(*x*) *Fraser v. Kershaw*, 2 K. & J. 499.

(*y*) *Collins v. Young*, 1 Macq.

(*z*) *Freeland v. Stansfield*, 2 Sm. & G. 487; *Fraser v. Kershaw*, 2 K. & J. 499.

(*a*) *Collins v. Young*, 1 Macq. 385; see *Baldwin v. Booth*, W. N. 1872, 229. The Probate Division will not appoint a receiver *pendente lite* against a surviving partner, unless under very special circumstances. *Horrell v. Wills*, L. R. 1 P. & M. 103.

not appoint a receiver: thus, where one partner had died and the other had been adjudicated bankrupt, the court, on the application of the trustee in bankruptcy, discharged an order for a receiver made in a partnership action commenced by the executors of the dead partner, on proof that the solvency of the partnership and of the dead partner's estate was very doubtful (*b*).

The reasoning on which the court proceeds, in refusing to appoint a receiver at the instance of one member of a firm against another, does not apply to the case of persons who acquire an interest in the partnership assets by events over which the parties have no control. If a member of a firm dies, or becomes bankrupt, the partnership is determined, as far as his personal representatives or trustee in bankruptcy are or is concerned. The personal representatives of a deceased partner are not strictly partners, nor is the trustee of a bankrupt partner strictly a partner, with the surviving or solvent partners or partner. They or he are or is only tenants or tenant in common with the surviving or solvent partners or partner to the extent of the interest which the deceased or bankrupt partner had in the partnership assets at the time of his death or bankruptcy, as the case may be (*c*). It is, consequently, a matter of course to appoint a receiver when all the partners are dead, and an action is pending between their representatives (*d*); or when such appointment is sought by a partner against the personal representatives or trustee in bankruptcy of his deceased

(*b*) *Hulme v. Rowbotham*, W. N. 1907, 162, 189: most of the assets were situate in the jurisdiction of the County Court which was the tribunal in the bankruptcy proceedings.

K.R.

(*c*) *Ex parte Williams*, 11 Ves. 5, 6; *Wilson v. Greenwood*, 1 Sw. 480; *Fraser v. Kershaw*, 2 K. & J. 499.

(*d*) *Phillips v. Atkinson*, 2 Bro. C. C. 272.

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or bankrupt co-partner (*e*). *Fraser v. Kershaw* (*f*) is a good illustration of the doctrine. There one partner had become bankrupt: the share of the other partner had been taken in execution under a *fi. fa.* for a separate debt, and had been assigned to the judgment creditor by the sheriff. The creditor, as the assignee from the sheriff of the share and interest of the non-bankrupt partner, claimed the right of winding up the affairs of the partnership, and to exclude the assignees of the bankrupt partner from interfering. But, on bill filed by the assignees in bankruptcy against the judgment creditor, the court granted an injunction and appointed a receiver, holding that the right of the non-bankrupt partner to wind up the affairs was personal to himself and not transferable, and, therefore, did not pass with his share and interest in the partnership assets (*g*).

Misconduct
of partner
a ground
for a
receiver.

The ground on which the court is most commonly asked to appoint a receiver is where, by the misconduct of a partner, his right of personal intervention in the partnership affairs has been forfeited, and the partnership funds are in danger of being lost. Mere quarrels and disagreements between the partners, arising from infirmities of temper, are not a sufficient ground for the interference of the court (*h*). The due winding up of the affairs of the concern must be endangered, to induce the court to appoint a receiver (*i*). The non-co-opera-

(*e*) *Freeland v. Stansfield*, 16 Jur. 792; 2 Sm. & G. 479.

(*f*) 2 K. & J. 496.

(*g*) For the procedure against partnership property for a partner's separate judgment debt, see the Partnership Act, 1890, s. 23, *supra*, p. 57.

(*h*) See *Goodman v. Whitcomb*, 1 J. & W. 593; *Marshall v. Colman*, 2 J. & W. 266; *Smith v. Jeyes*, 4 Beav. 504.

(*i*) See *Goodman v. Whitcomb*, 1 J. & W. 593; *Smith v. Jeyes*, 4 Beav. 505.

tion of one partner, whereby the whole responsibility of management is thrown on his co-partner, is not sufficient (*k*).

Where, however, a partner has so misconducted himself as to show that he is no longer to be trusted ; as, for example, if one partner colludes with the debtors of the firm, and allows them to delay paying their debts (*l*) ; or if he is carrying on a separate trade on his own account with the partnership property (*m*), or if a surviving partner insists on carrying on the business and employing therein the assets of his deceased partner (*n*) ; or if, in the opinion of the court, a case has arisen for the interposition of the court to secure the estate of a deceased partner against loss (*o*) ; or if, the partnership property being abroad, one of the partners goes off in order to do what he likes with it (*p*) ; or if the persons having the control of the partnership assets have already made away with some of them (*q*) ; or if there has been such mismanagement as to endanger the whole concern (*r*) ; or if one of the partners has acted in a manner inconsistent with the duties and obligations which are implied in every partnership contract (*s*) ;—in all such cases a receiver will be appointed.

(*k*) *Roberts v. Eberhardt*, Kay, 1872, 229 ; *Young v. Buckett*, 30 W. R. 511 ; 46 L. T. 269.
(*p*) *Sheppard v. Oxenford*, 1 K. & J. 491.

(*q*) *Evans v. Coventry*, 5 D. M. & G. 911.

(*r*) See *De Tastet v. Bordieu*, cited 2 Bro. C. C. 272 ; *Jeffreys v. Smith*, 1 J. & W. 298 ; *Hall v. Hall*, 3 Mac. & G. 86 ; *Chaplin v. Young*, 6 L. T. 97.

(*s*) *Smith v. Jeyes*, 4 Beav.

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The unwillingness of the court to appoint a receiver at the suit of one member of a firm against another being based on the confidence originally reposed in each other by the parties, the ground of the rule has no longer any place if it appears that the confidence has been misplaced (*t*). Accordingly, where a defendant, by false and fraudulent representations, induced the plaintiff to enter into partnership with him, and the plaintiff soon afterwards, on discovering the fraud, filed a bill praying that the partnership might be declared void and for a receiver, the court on motion ordered that a receiver should be appointed (*u*).

There is a case for a receiver, even although there be no misconduct endangering the partnership assets, if one partner excludes another partner from the management of the partnership affairs (*x*). This doctrine is acted on where the defendant contends that the plaintiff is not a partner (*y*), or that he has no interest in the partnership assets (*z*).

In *Hale v. Hale* (*a*), where the defendant sought to

505; *Young v. Buckett*, 30 W. R. 511; 46 L. T. 269.

(*t*) See *Chapman v. Beach*, 1 J. & W. 594 n.

(*u*) See *Ex parte Broome*, 1 Rose, 69.

(*x*) See *Wilson v. Greenwood*, 1 Sw. 481; *Goodman v. Whitcomb*, 1 J. & W. 592; *Rowe v. Wood*, 2 J. & W. 558; *Const v. Harris*, T. & R. 525. A dissolution which takes place on the refusal of an appointee under a will to become a partner is not a dissolution arising from the exclusion of the appointee by the

surviving partner, and therefore will not be a foundation for a receiver, *Kershaw v. Matthews*, 2 Russ. 62.

(*y*) *Peacock v. Peacock*, 16 Ves. 49; *Blakeney v. Dufaur*, 15 Beav. 40.

(*z*) *Wilson v. Greenwood*, 1 Sw. 471, where the plaintiffs were the assignees of a bankrupt partner. See, too, *Olegg v. Fishwick*, 1 Mac. & G. 294, where the plaintiff was the administratrix of a deceased partner.

(*a*) 4 Beav. 369.

exclude the plaintiff from all interest in the partnership assets, and relied on illegality as a defence to the suit, a receiver was appointed. In that case the plaintiff and defendant had carried on the business of brewers for many years in partnership together. The plaintiff filed a bill for a dissolution and the defendant thereupon denied the plaintiff's right to any account or relief whatever, on the ground, that he, being a spiritual person, was not competent by law to engage in any trading concern, and claimed the whole property himself. A receiver and manager was appointed, on the ground that the defendant insisted on a legal objection as destroying all right of his co-partner to a share in the profits, although the plaintiff was only a dormant partner, and the defendant's management of the business was in no way complained of (*b*).

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Inasmuch as the court will not appoint a receiver against a partner unless some special ground for doing so can be shown, it follows that, in the case of a firm consisting of three or four members, there is more difficulty in obtaining a receiver than in a firm consisting of two. For, the appointment of a receiver operating as an injunction against the members, there must be some ground for excluding all who oppose the application. If the object is to exclude some or one only from intermeddling, the appropriate remedy is rather by injunction than by the appointment of a receiver (*c*).

Where a partnership is alleged on the one side, and denied on the other, and a motion is made for a receiver, the court, if it directs an issue as to partnership or no

Course of
court where
the part-
nership is
denied.

(*b*) See also *Sheppard v. Owen-* was denied.
ford, 1 K. & J. 492, where a
receiver was appointed, although
the legality of the partnership

(*c*) See *Hall v. Hall*, 3 Mac. &
G. 79.

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partnership, usually declines to appoint a receiver until that question has been determined (*d*). But if a special case be made out, as, for instance, if it be shown that the assets are in danger, a receiver will be appointed although the partnership is denied (*e*).

Receiver
appointed
where
partners
have by
agreement
divested
themselves
of the right
of winding-
up.

Another case, in which the court may be called upon to appoint a receiver, is where the partners have by agreement divested themselves more or less of their right to wind up the affairs of the concern. In *Daris v. Amer* (*f*), for instance, the plaintiff and defendant, on dissolving partnership, appointed a third person to get in the assets of the partnership, and agreed not to interfere with him. After the agreement had been partially acted on, one of the partners died, and, disputes arising between the executors of the deceased partner and the surviving partner, the latter got in some of the debts of the firm in violation of the agreement. A bill having been filed by the executors of the deceased partner for an injunction and a receiver, the court on motion appointed a receiver, but declined to grant an injunction, on the ground that there was no sufficient impropriety of conduct on the part of the defendant to render such an order necessary (*g*).

Receiver
appointed
though
partner-
ship has
expired.

The court has jurisdiction to appoint a receiver of a partnership business, with a view to selling the business as a going concern, notwithstanding that the partnership has expired in pursuance of a provision to that effect contained in the partnership deed (*h*).

(*d*) *Peacock v. Peacock*, 16 Ves.
49; *Fairburn v. Pearson*, 2 Mac.
& G. 144; *Tucker v. Prior*, 31
Sol. J. 781.

(*f*) 3 Drew. 64.

(*g*) See also *Turner v. Major*,
3 Giff. 442.

(*h*) *Taylor v. Neate*, 39 Ch. D.

(*e*) *Longbottom v. Woodhead*,
83 L. T. 423; 31 Sol. J. 796.

338.

Where partners have agreed to refer disputes to a foreign tribunal, the court will not appoint a receiver during the liquidation of the partnership affairs, unless it is shown that the rights of the partners cannot be sufficiently protected by the foreign tribunal (*i*).

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Receiver
pending
action in
foreign
tribunal.

In cases of mining partnerships a receiver will be appointed or refused upon the same principles as in other cases of partnership. Accordingly, if a dissolution or winding-up is not sought, a receiver will not be appointed (*k*); but, where a dissolution or winding-up is sought, a receiver and manager will be appointed, if there are any such grounds for the appointment as are sufficient in other cases (*l*), or if the partners cannot agree as to the proper mode of working the mines until they are sold (*m*).

Receiver
of mining
partner-
ships.

In *Rowe v. Wood* (*n*) a receiver was refused, although one of the partners excluded the other from interfering in the concern; but the case was a peculiar one, for the partner complained of was not only a partner but also a mortgagee in possession, and his mortgage debt was unsatisfied. Again, in *Norway v. Rowe* (*o*), although the plaintiff had been excluded, a receiver of a mining concern was refused on the ground of his laches; for he had been excluded for some time, and had taken no steps to assert his rights until the mines proved profitable (*p*).

In *Rowlands v. Williams* (*q*), where one of the partners

(*i*) *Law v. Garrett*, 8 Ch. D. 26. Kay, 159; *Lees v. Jones*, 3 Jur. N. S. 954.

(*k*) *Roberts v. Eberhardt*, Kay, 148. (*n*) 2 J. & W. 553.

(*o*) 19 Ves. 144, at pp. 158,

(*l*) *Ib. Sheppard v. Oxenford*, 159.

1 K. & J. 491. (*p*) See *Clegg v. Edmondson*, 8

(*m*) *Jefferys v. Smith*, 1 J. & D. M. & G. 808.

W. 298; *Roberts v. Eberhardt*, (*q*) 30 Beav. 310.

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in a mining concern had become lunatic, the court would not appoint a manager to carry on the business, but ordered a sale, and appointed an interim manager only.

Liability
and indem-
nity of
receiver.

A receiver and manager of a partnership business is an officer of the court, not an agent of the partners: he is, therefore, personally liable to persons dealing with him, subject to a right of indemnity against the assets; if these are deficient he cannot claim to be indemnified by the partners, even in respect of debts paid by him which were incurred before his appointment and though he was appointed under a consent order (*r*).

Partner
appointed
receiver.

If the court, on being applied to for the appointment of a receiver, thinks that a proper case for such an appointment is made, and the partner actually carrying on the business has not been guilty of such misconduct as to have rendered it unsafe to trust him, the court generally appoints him receiver and manager without a salary (*s*). It is usual, however, to require him to give security duly to manage the partnership affairs, and to account for moneys received by him (*t*). In other cases the appointment of a receiver may be referred by the judge to the Master, and leave is frequently given for each partner to propose himself. A partner who is appointed receiver becomes an officer of the court, and must act and be regarded accordingly (*u*). He is, therefore,

(*r*) *Boehm v. Goodall* [1911],
1 Ch. 155.

(*s*) *Wilson v. Greenwood*, 1 Sw.
483; see *Maund v. Allies*, 4 M.
& C. 507; *Sheppard v. Oxenford*,
1 K. & J. 501; *Hoffmann v.*
Duncan, 18 Jur. 69; *Sargent v.*
Read, 1 Ch. D. 600.

(*t*) *Wilson v. Greenwood*, 1 Sw.
471; *Blakeney v. Dufaur*, 15

Beav. 44; *Sargent v. Read*, 1
Ch. D. 600; *Collins v. Barker*
[1893], 1 Ch. 578.

(*u*) See *Blakeney v. Dufaur*, 15
Beav. 43; *Sargent v. Read*, 1
Ch. D. 600. See, as to forms of
order for a receiver, Seton, 7th
ed. pp. 728 *et seq.*; *Wilson v.*
Greenwood, 1 Sw. 484.

entitled to be paid his remuneration and costs in full out of the partnership assets received by him, though he is indebted to the partnership and unable to pay (*x*). Chap. II.
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The court, by appointing a partner to be receiver, protects his operations, and gives him power to have recourse to the court for assistance and advice, but it does not enable him to do that, as against his partner, which the existing conventions or agreements between the parties do not justify (*y*).

Where there was a conflict of interest between the receiver and the separate estate of a partner, whose trustee in bankruptcy the plaintiff was, it was held that the receiver ought not to be represented by the plaintiff's solicitor but by the solicitor for the defendant (*z*).

In cases where a receiver of partnership property is appointed, the order should direct the other partners and all other parties to deliver over to the receiver all securities in their hands for such estate or property, and also the stock in trade and effects of the partnership, together with all books and papers relating thereto (*a*). The court may abstain from making an order for the delivery of partnership books and papers, if there is no necessity for it, and if it would occasion inconvenience (*b*). Form of
order.

Where there is no properly constituted governing body of a joint stock company, it has been held that the court will interfere by appointing a receiver, until a meeting can be called for the purpose of appointing a governing body (*c*). Receiver
appointed
of property
of joint
stock com-
pany until
meeting of
company.

(*x*) *Davy v. Scarth* [1906], 1
Ch. 55.

(*y*) *Nieman v. Nieman*, 43
Ch. D. 198.

(*z*) *Bloomer v. Curie*, 51 S. J.
277.

(*a*) Seton, 7th ed. p. 733.

(*b*) *Dacie v. John, McClell.*
206.

(*c*) *Trade Auxiliary Co. v.*
Vickers, L. R. 16 Eq. 298. But
the decision in this case, if it is

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By section 23 of the Partnership Act, 1890, a judgment creditor of a partner may obtain an order appointing a receiver of that partner's share of profits, and of any other moneys which may be coming to him in respect of the partnership (*d*).

SECTION 11.—IN CASES OF LUNACY.

Sect. 11.

In cases of lunacy the court has always exercised a jurisdiction to appoint a receiver though no action is pending (*e*).

It was held in an old case that a receiver of a lunatic's estate might be appointed, where it appeared that no person could be found who would act as committee of the estate, and give the necessary security, without being paid (*f*). So, also, a receiver would be appointed where the committee was infirm, or where the management of the estate was very onerous (*g*), or where the committee lived far from the estate (*h*). In one case where it was thought expedient to appoint a receiver, and the person appointed as committee of the estate declined to act as committee if another person was appointed receiver, an inquiry was directed as to the propriety of employing the committee in the latter capacity (*i*).

to be supported, must, it is conceived, be regarded as depending on the exceptional circumstances of the case. See Seton, 7th ed. pp. 694, 754, and consider *MacDougall v. Gardiner*, L. R. 10 Ch. 606, and Lindley on Companies, 6th ed. p. 778.

(*d*) See *supra*, p. 57; also *Brand v. Sandground*, 85 L. T.

517.

(*e*) *Ex parte Whitfield*, 2 Atk. 315.

(*f*) *Ex parte Radcliffe*, 1 J. & W. 639.

(*g*) *Re Birch*, Shelf. on Lun. 187.

(*h*) *Re Scaman*, Shelf. on Lun. 187.

(*i*) *Re Langham*, 1 Jur. 281.

Under the present practice committees are seldom appointed. By section 116 of the Lunacy Act, 1890 (53 Vict. c. 5), the court in lunacy was authorised to appoint persons (usually called receivers) to exercise large powers of administration and management over the property of the following (*k*): (1) persons lawfully detained as lunatics, though not so found by inquisition (*l*); (2) persons incapable, through mental infirmity or disease, of managing their own affairs, though not detained as lunatics (*m*); (3) persons of unsound mind who are incapable of managing their affairs whose property does not exceed £2,000 in total value, or £100 in yearly income (*n*); (4) persons who are or have been criminal lunatics, and who continue insane and in confinement (*o*). And by section 1 of the Lunacy Act, 1908 (8 Edw. 7, c. 47), the powers of management of the property of the above persons are extended to include all powers which might be exercised by a committee of the estate of a lunatic so found by inquisition, whether derived under the Lunacy Acts or otherwise (*p*). As a

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Receivers
under
s. 116 of
Lunacy
Act, 1890.

Where a committee was appointed in addition to a receiver, it was usual to restrain the latter from receiving rents and profits; see *Re Billinghamurst*, Amb. 104; *Ex parte Radcliffe*, 1 J. & W. 639; 1 Coop. C. C. 250; *Re Frank*, 2 Russ. 450, at p. 451.

(*k*) As to lunatics so found, see s. 108.

(*l*) Section 116 (1) c. This sub-section applies to persons detained in accordance with the Idiots Act, 1886, *Re Whalley* [1906], 1 Ch. 565; but not to persons detained as lunatics in

foreign countries, *Re Watkins* [1896], 2 Ch. 336. As to the jurisdiction in such cases see s. 134 and *Re Carr's Trusts* [1904], 1 Ch. 792; *Re de Larra-goiti* [1907], 2 Ch. 14; and also *Didisheim v. London and Westminster Bank* [1900], 2 Ch. 15.

(*m*) Section 116 (1) d.

(*n*) Section 116 (1) e.

(*o*) Section 116 (1) f.

(*p*) The effect of this enactment is to nullify the restrictions on the powers of receivers occasioned by such decisions as, *Re S. S. B.* [1906], 1 Ch. 712;

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result of this legislation it is rarely necessary to appoint a committee, as a receiver can do all that is required; he has, however, no powers over the person of the patient.

The receiver is either appointed with plenary powers, in which case further applications to the Master, except as regards passing of accounts, are as a rule unnecessary, or with restricted powers (*q*). Remuneration is not allowed except in special circumstances.

Practice.

The receiver is appointed on summons at Chambers before a Master in Lunacy (*r*). The person appointed must, unless otherwise ordered, before acting give security, to be fixed by the Master, duly to account for what he shall receive and to pay the same as the Master directs (*s*). The provisions of the Lunacy rules respecting a committee, his accounts, payments and matters of a like nature, apply with the necessary modifications to the case of a receiver (*t*).

When the property of a lunatic becomes subject to the control of the court in lunacy by the appointment of a receiver, and the receiver is in physical possession, it cannot be seized under a writ of *fi. fa.* by an execution

Re De Moleyns and Harris's Contract [1908], 1 Ch. 110.

(*q*) Where the lunatic is entitled to a grant of administration, the grant is made to the receiver if he has plenary powers, without, it seems, an order from the Master in Lunacy, but not if his powers are restricted; see *In the goods of Leese* [1894], P. 160; *In the goods of Cooke* [1895], P. 68, and Heywood and Massey's Lunacy Practice, 4th ed. p. 266.

(*r*) Rules in Lunacy, 1892, rr. 19, 55, 83. As to using one set of affidavits on two summonses where the facts are practically the same, see *Re Morris* [1912], 1 Ch. 730.

(*s*) Rule 83. As to discharge rules of 1893, r. 9.

(*t*) Rule 84. See, further, as to practice on appointment, Heywood and Massey's Lunacy Practice, 4th ed. p. 104; and on discharge, p. 200.

creditor of the lunatic, the lunatic's right to maintenance having priority over the claims of the execution creditor (*u*). But where a judgment creditor, having notice of the pendency of a summons in Lunacy for the appointment of a receiver, issued a *fi. fa.* under which the goods of the lunatic were seized before any order was made on the summons, and a receiver was afterwards appointed while the goods were in the possession of the sheriff, it was held that the creditor's claim must be satisfied before anything could be allowed for the maintenance of the lunatic (*x*). For a receiver in Lunacy is only authorised to take possession of the lunatic's equitable interest in his property; and accordingly an order under section 116 of the Lunacy Act, 1890 (53 Vict. c. 5), appointing such a receiver does not affect any previously acquired rights of third persons against the property of the lunatic, which are of such a nature that effect can be given to them at law or in equity, as, for instance, a vendor's lien for unpaid purchase-money (*y*).

An order made by a Master in Lunacy under section 116 (1) (c) of the Lunacy Act, 1890, appointing a receiver and manager of the property of a person of unsound mind not so found by inquisition, who at the date of the order is "lawfully detained" under a reception order, does not necessarily come to an end when the reception order expires, but a further order is required to discharge it (*z*). The authority of a receiver appointed under section 116 expires upon the death of the lunatic :

(*u*) *Re Winkle* [1894], 2 Ch. 519. Ch. 462, at pp. 472, 473, explaining *Re Winkle*, *ubi supra*.

(*x*) *Re Clarke* [1898], 1 Ch. 336. (*z*) *Re B. A. S.* [1898], 2 Ch 392.

(*y*) *Davies v. Thomas* [1900], 2

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he cannot, therefore, take credit for payments made, nor can his sureties be made liable for rents and profits received by him after that date (*a*).

It is not usual to appoint a receiver of the dividends of stock standing in the Bank of England in the name of a person of unsound mind not so found: the better course in such cases is to bring the stock into court (*b*). But where an order made under section 116 (*d*), of the Lunacy Act, 1890, authorised the receiver to receive and give a discharge for all dividends accrued due before lodgment, it was held that the Bank must pay these dividends to the receiver (*c*).

In a case in which a pauper lunatic, who was being maintained by the guardians of a union, became entitled on the death of an uncle to a sum of £261, an order was made by a Master in Lunacy, on the application by summons of the guardians, appointing a receiver of the £261, and directing him to pay out of it part of the cost of the past maintenance of the lunatic, and to apply the balance for her future maintenance (*d*).

Where, however, a receiver in Lunacy of funds of a lunatic living in a pauper asylum has been appointed, an injunction may be granted to restrain the guardians from levying a distress against trustees of the funds to enforce a magistrates' order for payment of the funds to the guardians, and the guardians may be ordered to pay the costs of an action brought by the lunatic, suing by

(*a*) *Re Walker* [1907], 2 Ch. 120. The receiver, himself, it seems, could not be made liable in the lunacy, though he could be in properly constituted proceedings; see also, *Re Seager Hunt* [1906], 2 Ch. 295.

(*b*) *Re Browne* [1894], 3 Ch. 412; *Re Auchmuty*, 99 L.T. 462.

(*c*) *Re Spurling* [1909], 1 Ch. 199; see p. 201 for form of order.

(*d*) *Re Taylor* [1901], 1 Ch. 480.

the official solicitor as next friend, for the purpose of obtaining such an injunction (*e*). Chap. II.
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In a proper case the court will, pending an application for an inquisition, appoint an interim receiver of the estate of the supposed lunatic, and, if the case is urgent, will do so upon an *ex parte* application; but the person appointed must not, in default of a direction to the contrary, receive any part of the property until he has given security (*f*). And in such a case, if actions are pending against the supposed lunatic, the receiver's proper course is to apply to be appointed guardian *ad litem* in the several actions (*g*). Where a petition had been presented, but pending the hearing, a coroner's jury had found a verdict of murder while of unsound mind against the supposed lunatic, a receiver was appointed till further order, the expression "interim" receiver being inappropriate to such a case (*h*). Interim
receiver.

In *Re Cathcart* (*i*), pending an inquiry as to the lunacy of an alleged lunatic, the official solicitor had been appointed receiver of her estate, and in that capacity had in his possession a mass of documents belonging to her. Upon an application made on her behalf for liberty to inspect and take copies of such of the documents as she might require for her defence on the inquiry, the Court of Appeal held that the proper course would be for the Master in Lunacy, who had charge of the inquiry to look through the documents and ascertain which of them were relevant to the inquiry; but that the parties were not at liberty to go before the Master for the purpose. Documents
belonging
to alleged
lunatic in
possession
of receiver.

(*e*) *Winkle v. Bailey* [1897], 1 Ch. 123.

(*g*) S. C., *per* Cotton, L. J. p. 610.

(*f*) *Re Pountain*, 37 Ch. D. 609, 610.

(*h*) *Re A. G.*, 53 S. J. 615.

(*i*) W. N. 1902, 80.

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Where there are no proceedings in Lunacy the High Court will not now, it seems, exercise its jurisdiction to order rents and profits of property belonging to a lunatic to be paid to a person for the benefit of the lunatic, if the latter is within the jurisdiction (*k*); application should be made to the court in lunacy for a receiver. The High Court may, however, make such an order where the lunatic is out of the jurisdiction (*l*).

SECTION 12.—IN THE CASE OF TENANTS IN COMMON.

Sect. 12.

The Court of Chancery would not grant a receiver against a tenant in common in possession at the suit of another tenant in common, except in cases of destructive waste or gross exclusion (*m*). But under the Judicature Act, 1873, the court has jurisdiction in a partition action to appoint a receiver until the trial, although there has been no exclusive occupation (*n*).

Exclusion, in the true legal sense of the word, is where one tenant in common receives the whole of the rents and profits, and refuses to pay over to his co-tenant in common the share due to him (*o*). A bare notice to the tenants by one tenant in common, not to pay the rents any longer to the other tenant in common, is not an exclusion. Accordingly, a motion for a receiver by one tenant in

(*k*) *Re Barker's Trusts*, W. N. 159; see *Sandford v. Ballard*, 1904, 13. 30 Beav. 109.

(*l*) *Re Carr's Trusts* [1904], 1 Ch. 792; see also *Didlsheim v. London and Westminster Bank* [1900], 2 Ch. 15. (n) *Porter v. Lopes*, 7 Ch. D. 358.

(o) *Tyson v. Fairclough*, 2 Sim. & St. 142; *Sandford v. Ballard*, 33 Beav. 401.

(*m*) *Norwilly v. Rowe*, 19 Ves. 33 Beav. 401.

common against his co-tenant in common, on the ground that the latter had advertised the estate for sale, and had given notice to the tenants to pay their rents to him alone, was refused, because the conduct complained of did not amount to an exclusion (*p*).

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The same considerations are applicable to the case of tenancy in common of an equitable estate. An equitable tenant in common was not entitled under the old practice to have a receiver appointed as against his co-tenant in common, unless there was exclusion. If the conduct of the tenant in common in possession amounted to exclusion, or if the trustee of the legal estate put him in possession of the whole estate to the exclusion of the other, a receiver of the whole estate would be appointed. If there was no exclusion, a receiver of the applicant's share only was appointed (*q*).

Equitable
tenants in
common.

Instead of making an order for the appointment of a receiver, the court may order the tenant in possession to pay an occupation rent (*r*), or to give security for payment of the due proportion of the rents to his co-tenant (*s*).

Receiver
not ap-
pointed on
submission
of party.

Where some of the tenants in common are infants, there may be a receiver over the whole estate, with directions to pay to the adults their shares in the rents (*t*). In a case where there was a dispute between tenants in common of real estate, in reference to the receipt of rents, and some of the parties interested were infants

Some of the
tenants in
common
infants.

(*p*) *Tyson v. Fairclough*, 2 Sim. & St. 142; but see *Searle v. Smales*, 3 W. R. 437.

(*r*) *Porter v. Lopes*, 7 Ch. D. 359.

(*q*) *Sandford v. Ballard*, 30 Beav. 109; 33 Beav. 401; see, too, *Hargrave v. Hargrave*, 9 Beav. 549; and cf. *Searle v. Smales*, 3 W. R. 437.

(*s*) *Street v. Anderton*, 4 Bro. C. C. 414; *Murray v. Cockerell*, W. N. 1866, 223.

(*t*) *Smith v. Lyster*, 4 Beav. 227.

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and others tenants for life, the court appointed one of the disputants who had an estate for life, and another person nominated by the other parties, to be joint receivers of the whole estate (*u*). If a receiver has been appointed for the benefit of two infant tenants in common, he will not be discharged as to the share of one of them who has attained his full age. The object of the appointment having been to protect the property during the infancy of both, and the purpose for which the receiver was appointed having therefore not been fully accomplished, the application for his discharge should be delayed until both are of age (*x*). The one who since the appointment of a receiver has become adult may, however, apply for the payment of his share to himself (*y*).

Tenancy in
common
when an
interest in
land is in
the nature
of a trade.

If an interest in land to which two or more persons are entitled as tenants in common is in the nature of a trade, a receiver will be appointed or refused on the same principles as in partnership cases. A colliery, for instance, may be considered as being in the nature of a trade; and where persons have different interests in it, it may be regarded as a partnership; and the difficulty of knowing what is to be paid for wages, and the expenses of management, gives the court a jurisdiction as to the mesne profits which it would not assume with respect to other lands (*z*).

There are two ways in which a mining concern may be viewed: it may be a mining concern really held as property by persons who have acquired it for the purposes of trade, as in a case where an estate containing mines has descended from the owner to two co-heirs; and such

(*u*) *Ramsden v. Fairthrop*, 1
N. R. 389.

(*y*) *Ib.*

(*x*) *Smith v. Lyster*, 4 Beav.
227.

(*z*) *Jefferys v. Smith*, 1 J. & W.

298, at p. 302.

owners, though they did not acquire it for mining purposes, may nevertheless agree to work the mines together with their joint property. That would be working the mines in partnership. There would be a partnership in the working, though not in the land. The other case would be one in which the whole property was intended to be used as a partnership concern. In either case a receiver may be appointed upon the same principles as in other partnership cases (*a*).

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SECTION 13.—IN THE CASE OF PERSONS IN POSSESSION
OF REAL ESTATE UNDER A LEGAL TITLE.

The Court of Chancery would not, at the instance of a person alleging a mere legal title against another party who was in possession of real estate, and who also claimed to hold by a legal title, disturb that possession by appointing a receiver. There being open to the plaintiff a full and adequate remedy at common law, he had no equity to come to the Court of Chancery for relief. The court would not interfere with a legal title, unless there was some equity by which it could affect the conscience of the party in possession. There might be cases in which the court would interfere to prevent absolute destructive waste, where the value of the property would be destroyed if steps were not taken, or where the contest lay between a person having a well-established pedigree and a person without any reasonable appearance of title; but, as a general rule, where one person was in possession of the rents and profits of an estate, claiming

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In what cases a receiver would not be appointed by the Court of Chancery.

(*a*) *Roberts v. Eberhardt*, Kay, 159, *per* Lord Hatherley.

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to be the holder by a legal title, and another person also claimed to hold by a legal title, the former could not be ousted in the Court of Chancery until the true ownership of the legal title had been finally determined at law (*b*).

It was immaterial to the question that the possession might be vacant and that the court might not be asked to turn any one out of possession. The law looked on a person in possession of real estate as entitled to keep it until some one else could show a better title. Although the court would interfere to protect personal estate pending litigation as to probate, the case was different where real estate was the subject of contest (*c*).

In what cases the Court of Chancery would appoint a receiver against the legal estate.

The Court of Chancery would, however, interfere with the possession of a party holding under a legal title, by appointing a receiver, if a good equitable case were made to appear. If the court was satisfied, upon the pleadings and the materials it had before it, that the relief prayed by the bill would be given at the hearing, and that it was necessary, expedient, or equitable that the property in question should be secured until the hearing, there was a case for a receiver (*d*). Accordingly, a receiver would be appointed against a party having the legal title, if a case of fraud was made out to the satisfaction of the court (*e*). Where, for example, a man who had taken a lease of copyholds, during the widowhood of a woman who was entitled thereto for her widowhood, had concealed the death of the widow, and, taking advantage of the loss of the court rolls, pretended that the premises

(*b*) *Earl Tulbot v. Hope Scott*, 311; *Clark v. Dew*, 1 R. & M. 4 K. & J. 112; *Carrow v. Ferrior*, 103; *Bainbrigge v. Baldeley*, 3 L. R. 3 Ch. 719. Mac. & G. 420.

(*c*) *Carrow v. Ferrior*, L. R. 3 Ch. at p. 729.

(*e*) *Huguenin v. Basley*, 13 Ves. 105; *Lloyd v. Passingham*,

(*d*) *Mordaunt v. Hooper*, Amb.

16 Ves. 59.

were freehold and had descended to him as heir, Lord Hardwicke granted a receiver (*f*). So, where a bill was filed impeaching a sale of land on the ground of fraud, and alleging gross inadequacy of consideration and undue influence, the court appointed a receiver in a suit instituted against the devisees of the party charged with fraud (*g*). So, also, where a woman entitled to a life interest in certain real estates and a particular sum of stock, and a rentcharge issuing out of her husband's estates, fraudulently obtained a transfer of the stock, and sold it out, and afterwards assigned her life interest in the real estate and the rentcharge to her son for value, but with notice of the fraud, a receiver of the rents of the real estate, and of the rentcharge so assigned, was appointed at the suit of the persons interested in the stock after her death (*h*).

Another case in which the court would interfere, and appoint a receiver against persons holding under a legal title, was where trustees or executors had managed the trust estate improperly (*i*).

The disinclination of the Court of Chancery to appoint a receiver, where the property was in possession of a party having the legal estate, was felt in those cases only in which the estate of the party in possession was prior to that of the parties in litigation. Where the right to the possession was the subject of dispute, and the plaintiff, having an equitable interest, claimed the legal estate from the defendant in possession, the court would, if it saw clearly that the plaintiff had the right, and

(*f*) *Mordaunt v. Hooper*, Amb. 311. (*h*) *Woodyatt v. Gresley*, 8 Sim. 187.

(*g*) *Stillwell v. Wilkins*, Jac. 282. (*i*) *Supra*, pp. 17, 19.

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that the ultimate decree would be in his favour, appoint a receiver. Accordingly, a receiver would be appointed pending a suit for specific performance against a party holding under a legal title, if the court was satisfied that the decree would be in favour of the plaintiff, and that it was expedient or equitable that a receiver should be appointed (*k*). And upon the same principle, where a person took conveyance of a legal estate subject to equitable interests, if he did not satisfy those interests he had to submit to the appointment of a receiver (*l*). If, for example, the mortgagee of a legal estate subject to an equitable rentcharge refused to pay the rentcharge, a receiver would be appointed (*m*). So, also, where a judgment creditor had obtained possession of land under an *elegit*, a receiver was appointed at the suit of an equitable mortgagee by deposit of deeds, whose security was prior in date to the recovery of the judgment debt (*n*).

The rule, that a receiver would not be appointed when the person having the legal estate was in actual possession of the property, did not apply where the person in possession was in possession merely upon execution under a judgment. In such a case, a creditor who had taken out execution could not hold property against an estate created prior to his debt (*o*).

Judicature
Act, 1873.

The jurisdiction of the High Court of Justice in appointing receivers has been so much enlarged by the Judicature Act of 1873, that receivers may now be

(*k*) *Supra*, pp. 82—85.

(*l*) *Pritchard v. Fleetwood*, 1 Mer. 54.

(*m*) *Pritchard v. Fleetwood*, 1 Mer. 54; see, too, *Shee v. Harris*, 1 J. & L. 92.

(*n*) *Whitworth v. Gaugain*, Cr. & Ph. 325; 3 Ha. 416; 1 Ph. 728; *Anderson v. Kemshead*, 16 Beav. 344.

(*o*) *Supra*, pp. 51—52.

appointed at the instance of persons claiming against a legal title, in cases in which the Court of Chancery would not have made the appointment (*p*).

Thus a receiver of the rents of land may, in a proper case, be appointed in the absence of the owner of the legal estate (*q*). So, also, a receiver may be appointed pending an action for trespass (*r*). And where no executor has been appointed by a will, and there is danger of a trespass or other wrong being committed upon the testator's land while there is no personal representative, the appointment of a receiver may be obtained even before the grant of letters of administration with the will annexed (*s*). Again, in an action for the recovery of land, brought by a landlord against his tenant under a proviso for re-entry for breach of covenants in his lease, a receiver of the rents and profits of the land, pending the trial of the action, may be appointed on the plaintiff's application (*t*).

In any action to recover possession of land the High Court can appoint a receiver, although the title is legal (*u*). But the court will exercise its discretion with a view to all the circumstances of the case. Amongst other things, it will bear in mind the position of the tenants, who, if the defendant is not a person of undoubted solvency and remains in receipt of the rents, may be called upon to pay twice over if the plaintiff succeeds. The court will also consider the probability of the plaintiff succeeding,

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| <p>(<i>p</i>) <i>Real and Personal Advance Co. v. Macarthy</i>, 27 W. R. 707.</p> <p>(<i>q</i>) <i>Berry v. Keen</i>, 51 L. J. Ch. 912.</p> <p>(<i>r</i>) <i>Percy v. Thomas</i>, 28 Sol. J. 533.</p> <p>(<i>s</i>) <i>In the goods of Pryse</i> [1904],</p> | <p>P. 301, at p. 304; 73 L. J. P. 84.</p> <p>(<i>t</i>) <i>Guatkin v. Bird</i>, 52 L. J. Q. B. 263.</p> <p>(<i>u</i>) <i>Forwell v. Van Grutten</i> [1897], 1 Ch. 64.</p> |
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and the length of the defendant's possession, and whether he has any *primâ facie* title. Therefore, where the defendant in an ejectment action was a person of small means with a shadowy title, and the plaintiff's title appeared to be satisfactorily made out, subject to a point on the construction of a will which the court considered very unlikely to be decided against him, a receiver was appointed (*x*).

Receiver
of licences.

In an action by a lessor for recovery of possession of an hotel where the licences were in jeopardy and there appeared to be a strong *primâ facie* probability of the plaintiff succeeding in recovering possession at the trial, the Court on interlocutory motion appointed a receiver of the licences, which were ordered to be handed over to him, as well as of the rents and profits, and directed that the receiver should be at liberty to keep the premises open as an hotel and to do all acts necessary to preserve the licences (*y*).

SECTION 14.—IN OTHER CASES.

Sect. 14.
Inter-
pleader.

The court or a judge may, in an interpleader to try the right to goods seized in execution under R. S. C. Ord. LVII. r. 15, order that, instead of a sale by the sheriff, a receiver and manager of the property be appointed (*z*).

Pending
reference
to arbitra-
tion.

The court has jurisdiction to appoint a receiver pending a reference to arbitration, if a proper case is

(*x*) *John v. John* [1898], 2 Ch. 573.

(*y*) *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79, correcting form of order drawn up in *Charrington & Co. v.*

Camp [1902], 1 Ch. 386. See further for addition to order, Seton, 7th ed. 732.

(*z*) *Howell v. Dawson*, 13 Q. B. D. 67.

made out for doing so (a). Where there is an agreement to refer all matters in dispute under a contract to arbitration, and an action is subsequently brought on the contract, in which it is found to be desirable, for the protection of the property which is the subject of the contract, that a receiver should be appointed, it is competent for the court to appoint a receiver, and by the same order to stay all further proceedings in the action, except for the purpose of carrying out the order for a receiver (b).

The court has jurisdiction to appoint a receiver pending litigation in a foreign court (c).

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Receiver
appointed
pending
litigation
in a foreign
court.

(a) *Law v. Garrett*, 8 Ch. D. [1892], 1 Ch. 633.
26; *Halsey v. Windham*, W. N. 1882, 108.

(b) *Compagnie du Sénégal v. Wood*, 53 L. J. Ch. 167; W. N. 1883, 180; *Pini v. Roncoroni*

(c) *Transatlantic Co. v. Pietroni*, John. 607; see, too, *Evans v. Puleston*, W. N. 1880, 89, 127; *Law v. Garrett*, 8 Ch. D. 27.

CHAPTER III.

OVER WHAT PROPERTY A RECEIVER MAY BE APPOINTED.

Chap III.

IN determining whether or not the property is of such a nature that the court will appoint a receiver of it, it is necessary to consider the nature of the applicant's title. If he is seeking to enforce a charge given by the respondent, he will obtain the assistance of the court much more readily than if he is merely a judgment creditor applying for "equitable execution." In the former case he could have a receiver of the respondent's future earnings; in the latter he could not (*a*).

A receiver may be appointed of the rents and profits of real estate, and also of all personal estate which may be taken in execution (*b*). In all cases in which execution may be had by writ of *fi. fa.* or *elegit*, it is competent to the court to grant a receiver (*c*). The appointment of a receiver is, however, not limited to such property as may be taken in execution, but extends to whatever is considered in equity to be assets (*d*). It must be remembered that a receiver by way of equitable execution will

(*a*) *Holmes v. Millage* [1893], 1 Q. B. 551, see p. 559.

(*b*) *Davis v. Duke of Marlborough*, 1 Sw. at p. 83; 2 Sw. at p. 132.

(*c*) *Ib.*

(*d*) *Blanchard v. Cawthorne*, 4

Sim. 572; *Gore v. Bowser*, 3 Sm. & G. 8; and see *Willis v. Cooper*, 44 S. J. 698, where the court refused to appoint a receiver over untaxed costs in respect of which legal execution could not issue.

only be appointed where there is an impediment to legal execution (*e*). Chap. III.

A receiver may be appointed over a newspaper (*f*); over tithes (*g*); over a rentcharge (*h*); over public-house licences (*i*); over an equity of redemption (*k*); where a legal estate is outstanding (*l*); where a fund in another court is payable to a judgment debtor (*m*); over the income of a trust fund (*n*); over a judgment debtor's interest in an outstanding charge upon land and subsisting policies of insurance (*o*); over the interest of a joint tenant (*p*). Again, a receiver may be appointed of a reversionary interest (*q*); of a sufficient portion of a reversionary legacy to satisfy plaintiff's debt (*r*); of the

(*e*) *Ante*, pp. 50—53.

W. R. 381; *Webb v. Stenton*, 11 Q. B. D. 530.

(*f*) *Chaplin v. Young*, 6 L. T. N. S. 97; *Kelly v. Hutton*, 17 W. R. 425.

(*o*) *Beamish v. Stevenson*, 18 L. R. Ir. 319; see *Orr v. Grierson*, 28 L. R. Ir. 20.

(*g*) *Lymberg v. Helsham*, 1 Ir. Ch. 633.

(*p*) *Hills v. Webber*, 17 T. L. R. 513. It seems that the tenants should attorn and pay a proper proportion of their rents to the receiver.

(*h*) *Wise v. Beresford*, 3 Dr. & War. 276; *Cullen v. Dean, &c. of Killaloe*, 2 Ir. Ch. 133.

(*i*) *Charrington & Co. v. Camp* [1902], 1 Ch. 386; *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79.

(*q*) *Fuggle v. Bland*, 11 Q. B. D. 711; *Tyrrell v. Painton* [1895], 1 Q. B. 202; *Ideal Bedding Co. v. Holland* [1907], 2 Ch. 157. And see *Re Jones and Judgments Act*, 1864, W. N. 1895, 123; though such an order cannot be followed by an order for sale, as a reversion cannot be actually delivered in possession under the last-mentioned Act. *Re Harrison and Bottomley* [1899], 1 Ch. 465.

(*k*) *Ex parte Evans*, 13 Ch. D. 253; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 275; *Smith v. Cowell*, 6 Q. B. D. 75.

(*l*) *Wells v. Kilpin*, L. R. 18 Eq. 298.

(*m*) *Westhead v. Reilly*, 25 Ch. D. 413. Where the fund is in court a charging order is the appropriate remedy; see *Fahey v. Tobin* [1901], 1 Ir. R. pp. 516, 517.

(*r*) *Macnicoll v. Parnell*, 35 W. R. 773.

(*n*) *Oliver v. Lowther*, 28

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separate estate of a married woman which she is not restrained from anticipating (*s*), even though the applicant's claim is only in respect of costs which have not been taxed (*t*); and of the arrears of income which she is restrained from anticipating (*u*), provided such arrears have accrued due before the date of the judgment (*x*). But the mere fact that the restraint has been removed by the death of the woman's husband does not entitle her creditor to the appointment of a receiver (*y*), the first section of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), providing that nothing in that section shall render available to satisfy any liability arising out of a married woman's contract any separate property which at that time (*i.e.*, at the date of the contract) or thereafter she is restrained from anticipating (*z*). A receiver may be appointed over property which a married woman is restrained from anticipating to enforce a judgment in respect of a debt incurred before marriage, where the restraint is imposed by a settlement made by a married woman of her own property (*a*); but not where the restraint is imposed by a settlement made by

(*s*) *Bryant v. Bull*, 10 Ch. D. 153; *Re Peace and Waller*, 24 Ch. D. 405; *Perks v. Mylrea*, W. N. 1884, 64; *Hill v. Cooper* [1893], 2 Q. B. 85.

(*t*) *Cummins v. Perkins* [1899], 1 Ch. 16.

(*u*) *Hood Barrs v. Heriot* [1896], A. C. 174.

(*x*) *Whiteley v. Edwards* [1896], 2 Q. B. 48; *Re Lumley* [1896], 2 Ch. 690; *Bolitho v. Gidley* [1905], A. C. 98. The order for a receiver was set aside

where plaintiff had waited till income had accrued due before signing judgment, *Colyer v. Isaacs*, 77 L. T. 198.

(*y*) *Pelton v. Harrison* [1891], 2 Q. B. 422.

(*z*) *Brown v. Dimbleby* [1904], 1 K. B. 28.

(*a*) Married Women's Property Act, 1882, s. 19. This applies to a debt incurred before a second marriage, *Jay v. Robinson*, 25 Q. B. D. 467.

another person of property not belonging to the married woman (*b*). Chap. III.

By section 2 of the Married Women's Property Act, 1893 (56 & 57 Vict. c. 63), in any action or proceeding instituted by a married woman, the court before which the action or proceeding is pending (*c*) may order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such order by the appointment of a receiver. This section applies only where the litigation is initiated by the married woman (*d*); it therefore has no application where there has been an unsuccessful appeal by a married woman defendant (*e*); nor where a married woman has presented a petition in an action (*f*); or has entered a *caveat* (*g*); or has taken out a summons in a divorce suit after decree absolute (*h*). But it applies to costs of a counterclaim (*i*); intervention under Ord. XII. r. 23 (*k*); interpleader proceedings (*l*); application for new trial by married woman plaintiff (*m*). The order is, it seems, not made as of course, but the onus is on the

(*b*) *Birmingham Excelsior Money Society v. Lane* [1904], 1 K. B. 35.

(*c*) The action may be pending though judgment has been entered.

(*d*) *Hood Barrs v. Heriot* [1897], A. C. 177; see *Huntly v. Gaskell* [1905], 2 Ch. 656, where the order for a receiver was made in a case where a married woman was co-plaintiff with her husband.

(*e*) *Hood Barrs v. Heriot* [1897], A. C. 177; *Dresel v. Ellis* [1905],

1 K. B. 574.

(*f*) *Hollington v. Dear*, W. N. 1895, 35.

(*g*) *Moran v. Place* [1896], P. 214.

(*h*) *Gordon v. Gordon* [1904], P. 163.

(*i*) *Hood Barrs v. Cathcart* [1895], 1 Q. B. 873.

(*k*) *Crickitt v. Crickitt* [1902], P. 177.

(*l*) *Nunn & Co. v. Tyson* [1901], 2 K. B. 487.

(*m*) *Dresel v. Ellis* [1905], 1 K. B. 574.

Chap. III. married woman to show why it should not be made (*n*). Unless the trustees are parties, the order can only be enforced by the appointment of a receiver (*o*); the proper course in dismissing the action of a married woman is to make the costs payable out of her separate estate (*p*), with liberty to apply for a receiver over property subject to a restraint (*q*).

Alimony,
&c.

There is no jurisdiction to appoint a receiver over a weekly sum ordered by a court of summary jurisdiction to be paid by a husband to a wife for her maintenance under the Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39) (*r*); nor over alimony ordered to be paid to a wife judicially separated (*s*); nor of sums ordered to be paid under section 1 of the Divorce and Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32) (*t*), by a husband for the support of his divorced wife (*u*). But a receiver may be appointed over sums payable to a wife under a separation deed (*x*), and, *semble*, over an annuity secured for a divorced wife under section 32 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85) (*y*).

(*n*) *Pawley v. Pawley* [1905], 1 Ch. 593, defendant appointed without remuneration. A form of notice of motion is given in the report.

(*o*) *Re Peace*, 24 C. D. 405.

(*p*) *Payet v. Payet* [1898], 1 Ch. p. 477.

(*q*) *Pawley v. Pawley* [1905], 1 Ch. p. 594. It seems that in the K. B. D. the application for a receiver should be made in the first instance to a master (*Bayley v. Maple*, 27 T. L. R. 284). For form of order, see Seton, 7th

ed. p. 849.

(*r*) *Paquine v. Snary* [1909], 1 K. B. 688.

(*s*) *Re Robinson*, 27 Ch. D. 160.

(*t*) Repealed and extended by Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12).

(*u*) *Watkins v. Watkins* [1896], P. 222.

(*x*) *Clark v. Clark and Saldji* [1906], P. 331; and see *Victor v. Victor* [1912], 1 K. B. 247.

(*y*) *Harrison v. Harrison*, 13 P. D. 180; this section was

There cannot be a receiver of the pay or half-pay of an officer in the army or the navy, for the assignment of such moneys is void upon grounds of public policy (*z*). Nor can there be a receiver of the salary of a person holding a civil office in the public service of the country (*a*); for, on grounds of public policy, pay given to induce persons to keep themselves ready for the service of the country, and pay for actual service rendered to the Crown, cannot be assigned (*b*). Upon these grounds it has been held that the salary of a clerk of the peace, a freehold office connected with the administration of justice, cannot be assigned (*c*); nor can the salary of a clerk of petty sessions in Ireland, who is a public and judicial officer (*d*), nor the salary of an assistant parliamentary counsel to the Treasury (*e*), be assigned.

There may be a receiver of the office of master forester of a royal forest (*f*). So, also, the assignment of the salary of the chaplain to a workhouse and workhouse infirmary not being void as being against public policy, there may be a receiver of such a salary (*g*).

A receiver may be appointed over pensions which may be lawfully assigned (*h*). Where the pension of a retired officer, whether naval, military, or civil, is not made inalienable by statute, it may be assigned, and a receiver

repealed and extended by Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12).

(*z*) *Apthorpe v. Apthorpe*, 12 P. D. 192.

(*a*) *Cooper v. Reilly*, 2 Sim. 564; 1 R. & M. 560.

(*b*) *Ex parte Huggins*, 21 Ch. D. 85, per Jessel, M. R.; *Re Mirams* [1891], 1 Q. B. 594.

(*c*) *Palmer v. Bate*, 6 Moo. 28;

2 B. & B. 673.

(*d*) *McCreery v. Bennett* [1904], 2 Ir. R. 69.

(*e*) *Cooper v. Reilly*, 1 R. & M. 560.

(*f*) *Blanchard v. Cawthorne*, 4 Sim. 566.

(*g*) *Re Mirams* [1891], 1 Q. B. 594.

(*h*) *Heald v. Hay*, 3 Giff. 467.

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Salaries,
&c.

Pensions.

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may be appointed over it (*i*). But the pension for past services of a retired officer in the army having been made inalienable by the Army Act, 1881, s. 141, a receiver cannot be appointed over it (*k*). So, also, the pension payable to a town clerk under the provisions of 32 & 33 Vict. c. 79, s. 7, is not assignable or chargeable with debts, and a receiver cannot be appointed over it (*l*).

Money received by an officer in the army for commutation of his pension stands on a different basis from a pension, and does not come within the prohibition contained in the Army Act, 1881, s. 141, against alienation of a pension. Accordingly, a receiver of such money may be appointed (*m*). A retiring annuity or pension of a covenanted member of the Indian Civil Service is not subject to the restrictions imposed by sections 11 and 12 of the Pensions (India) Act, 1871, and may be assigned (*n*).

There cannot be a receiver of a pension granted as well to support the grantee in the performance of future duties as for past services (*o*). Where a pension is

(*i*) *Dent v. Dent*, L. R. 1 P. & M. 366; *Willcock v. Terrell*, 3 Ex. D. 323; *Murphy v. Green*, 26 L. R. Ir. 610; *Moloney v. Cruise*, 30 L. R. Ir. 99; *Manning v. Mullins* [1898], 2 Ir. R. 34.

(*k*) *Birch v. Birch*, 8 P. D. 163; *Lucas v. Harris*, 18 Q. B. D. 127. And see *Jones v. Coventry*, [1909] 2 K. B. 1029, where a sum received in respect of retired pay and standing to the credit of an officer's account at a bank was held liable to attachment under a garnishee order; *secus* in the case of a sum for

which the pay warrant had been signed and handed to the bank for collection and which had been credited to the officer's account but which was not paid by the Paymaster until after the date of the garnishee order.

(*l*) *Brenan v. Morressy*, 26 L. R. Ir. 618.

(*m*) *Crowe v. Price*, 22 Q. B. D. 429.

(*n*) *Knill v. Dumergue* [1911], 2 Ch. 199, where such a pension was held liable to sequestration in England.

(*o*) *Davis v. Duke of Marl-*

granted not exclusively for past services, but as a consideration for some continuing duty or service, although the amount of it may be influenced by the length of the service which the party has already performed, it is against the policy of the law that it should be assignable (*p*). Thus a receiver will not be appointed over a pension where a person to whom it is granted remains liable to render future services (*q*). Chap. III.

It has been held in Ireland that a receiver will not be appointed over a gratuity which has been notified to have been awarded to a public servant before it is paid over (*r*). Gratuity.

A receiver may be appointed of heirlooms, or of articles specifically bequeathed by will (*s*). Heirlooms,

There can be no receiver of rates which are to be assessed at a future period, for until the assessment there is nothing to collect (*t*). The case of tolls is different from the case of rates. Tolls being a fixed payment and in the nature of a rent, there may be a receiver of the tolls of turnpike roads, or of canal or borough, 1 Sw. 74, 79; see, too, 2 Beav. 549. Rates, tolls, &c.

(*p*) *Wells v. Foster*, 8 M. & W. 152, per Lord Wensleydale.

(*q*) *Macdonald v. O'Toole* [1908], 2 Ir. R. 386. Pension under s. 10 of the Superannuation Act, 1859, the recipient being liable to perform future services if called on.

(*r*) *Timothy v. Day* [1908], 2 Ir. R. 26. The case would be the same with a gratuity which a private employer has announced his intention of paying: S. C. p. 31. Certain observations of the C. A. in *Re Lupton* [1912], 1 K. B. 107,

however, seem to render doubtful the correctness of the decision in *Timothy v. Day*. It appears to follow from the former case that a receiver might be obtained over "compensation" payable under the Superannuation Acts.

(*s*) *Earl of Shaftesbury v. Duke of Marlborough*, Seton, 7th ed. p. 734.

(*t*) *Drewry v. Barnes*, 3 Russ. 94; *Preston v. Corporation of Yarmouth*, L. R. 7 Ch. 655; but see per Lord St. Leonards, cited in *Gibbons v. Fletcher*, 11 Ha. 251.

Chap. III. railway, dock or market companies (*u*). The appointment of a receiver of a public undertaking which is carried on by trustees or others empowered by statute, does not supersede the powers of the statute, or make the future management illegal, as being carried on by unauthorised persons. The management remains in the hands of the trustees or others empowered by statute to manage it: a receiver does no more than take the rates, tolls, and taxes, pay the expenses of the undertaking and the interest on the mortgages, and then pay the surplus into court (*x*).

Ships.

A receiver may be appointed of a ship (*y*), of a ship and her gear (*z*), of the freight of a ship (*a*), and of the machinery of a steam vessel (*b*). So, also, a receiver may be appointed when an action of co-ownership is brought by the owner of one moiety of a vessel against the owner of the other moiety (*c*).

In a case where the legal title to a ship was in question, and the plaintiff had no equitable as distinct from a legal title, a receiver was refused, but an order was made by which the legal proceedings for ascertaining the title were accelerated, and the court took possession of the

(*u*) *Drewry v. Barnes*, 3 Russ. 105; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142; *De Winton v. Mayor, &c. of Brecon*, 26 Beav. 533; *Lord Crewe v. Edleston*, 1 D. & J. 93; *Munn v. Isle of Wight Railway Co.*, L. R. 5 Ch. 418; see, as to form of order, *Re Manchester and Milford Railway Co.*, Seton, 7th ed. p. 736; *Re Titchhurst Gas and Water Co.*, 128 L. T. Jo. 516.

(*x*) *Ames v. Birkenhead Docks*,

20 Beav. 350; and see *Carmichael v. Greenock Harbour Trustees* [1910], A. C. 274.

(*y*) *Re Edderside*, 31 Sol. J. 744.

(*z*) *Compagnie du Sénégal v. Smith, &c. Co.*, W. N. 1883, 180; 53 L. J. Ch. 166.

(*a*) *Roberts v. Roberts*, Seton, 6th ed. p. 772; *Burn v. Herlofson*, 56 L. T. 722.

(*b*) *Brenan v. Preston*, 2 D. M. & G. 831; 10 Ha. 334.

(*c*) *The Amphill*, 5 P. D. 224.

ship, giving each party liberty to apply for the possession and use upon giving security to deal with her as the court should direct (*d*). Chap. III.

A receiver may be appointed of the profits of the business of a solicitor (*e*). Business of solicitor.

A receiver will not be appointed over a patent which is not being worked (*f*). Patent.

A receiver cannot be appointed to receive the interest of a fund, the disposal of which is in the absolute discretion of trustees. A receiver cannot be appointed unless it be clearly shown that there is something payable to the defendant in such a way as to make his interest assignable. There is no case in which a receiver has been directed to receive a sum the payment of which to the debtor is wholly contingent and dependent on the will of another person (*g*). Cases in which a receiver will not be appointed.

Nor is it the practice of the court to appoint a receiver not of any specific property of a judgment debtor, but of his property generally (*h*). Nor will a receiver be appointed where the effect of the appointment might be to destroy the property (*i*).

The question whether a receiver can be appointed of the profits arising from the fellowship of a college has been the subject of conflicting decisions. In one case (*k*), decided in the year 1830, a motion for a receiver was refused with costs. But in a subsequent case (*l*) the Fellowships, &c.

(*d*) *Ridgway v. Roberts*, 4 Ha. 106.

(*e*) *Candler v. Candler*, Jac. 225.

(*f*) *Edwards & Co. v. Picard* [1909], 2 K. B. 903.

(*g*) *Reg. v. Lincolnshire County Court Judge*, 20 Q. B. D. 167.

(*h*) *Hamilton v. Brogden*, W.N. 1891, 14.

(*i*) *Ib.*

(*k*) *Berkeley v. King's College*, 10 Beav. 602.

(*l*) *Feistel v. King's College*, ib. 491.

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court, at the hearing of the cause in the year 1847, held that there might be a receiver of past and future appropriations in respect of the profits of a fellowship, the duties being so light that no questions of public policy could interfere with the validity of the assignment. Similarly, a receiver has been appointed of the profits of a canonry of a collegiate church, to which no cure of souls belonged, but only the duty of a certain residence and of attendance on divine service, the performance of which duty by the canon was of no benefit to the public (*m*).

Ecclesiastical benefices.

There cannot be a receiver of the profits of an ecclesiastical benefice, for a beneficed clergyman is prohibited by the statute 13 Eliz. c. 20 from charging the fruits of his living (*n*). The statute of Elizabeth was repealed by the statute 43 Geo. 3, c. 84, passed in the year 1803, and so the law remained until the year 1817, when, by the statute 57 Geo. 3, c. 99, the charging of ecclesiastical benefices was again prohibited, and the statute of Elizabeth was revived : so that between the years 1803 to 1817 there was no law prohibiting a clergyman from charging his ecclesiastical benefice (*o*); and a receiver was accordingly on several occasions, in cases arising between those years, appointed over an ecclesiastical benefice (*p*). The policy of the statute 13 Eliz. c. 20, revived by 57 Geo. 3, c. 99, was not in any way affected by the Judgments Act, 1838 (1 & 2 Vict. c. 110). A judgment against a beneficed clergyman does not create a

(*m*) *Grenfell v. Dean and York*, 1 M. & C. 553.
Canons of Windsor, 2 Beav. 544.

(*n*) *Hawkins v. Gathercole*, 6 D. M. & G. 1; see *Long v. Bishop of Peterborough*, 3 Sw. 109; *Metcalf v. Archbishop of*

(*o*) *Metcalf v. Archbishop of York*, 1 M. & C. 553.

(*p*) *Silver v. Bishop of Norwich*, 3 Sw. 112 n.; *White v. Bishop of Peterborough*, 3 Sw. 109; *Metcalf v. Archbishop of*

charge upon his benefice, entitling the judgment creditor to obtain, under the last-mentioned Act, a charging order and the appointment of a receiver of the profits of the benefice. The statute of Elizabeth in effect prevents such a creditor from taking proceedings to obtain a charging order, and he cannot have a receiver appointed over the profits of the benefice (*q*). Chap. III.

It is not necessary, in order that the court may have jurisdiction to appoint a receiver, that the property in respect of which he is to be appointed should be in England, or indeed, in any part of his Majesty's dominions (*r*). Persons have been appointed to receive the rents and profits of real estates, and to convert, get in, and remit the proceeds of property and assets, in cases in which the estate or property in question has been in Ireland (*s*); in the West Indies (*t*); in India (*u*); in Canada (*x*); in China (*y*); in Italy (*z*); in America (*a*); in New South Wales (*b*); in Jersey (*c*); in Brazil (*d*); and in Peru (*v*). But the court will not make such an

Property
in foreign
parts.

(*q*) *Hawkins v. Gathercole*, 6 D. M. & G. 1; *Bates v. Brothers*, 2 Sm. & G. 509.

(*r*) *Houlditch v. Lord Donegal*, 8 Bligh, 344.

(*s*) *Ib.*; *Bolton v. Curre*, W. N. 1894, 122; Seton, 7th ed. p. 776; see, too, 2 & 3 Will. 4, c. 33; 4 & 5 Will. 4, c. 82.

(*t*) *Bunbury v. Bunbury*, 1 Beav. 336; *Barkley v. Lord Reay*, 2 Ha. 308.

(*u*) *Logan v. Princess of Coorg*, Seton, 7th ed. p. 776; *Keys v. Keys*, *ib.*; 1 Beav. 425.

(*x*) *Tylee v. Tylee*, Seton, 7th ed. p. 777.

(*y*) *Hodson v. Watson*, Seton, 7th ed. p. 776.

(*z*) *Hinton v. Galli*, 24 L. J. Ch. 121; *Drewry v. Darwin*, Seton, 7th ed. p. 777.

(*a*) *Hanson v. Walker*, Seton, 7th ed. p. 777.

(*b*) *Underwood v. Frost*, Seton, 7th ed. p. 776.

(*c*) *Smith v. Smith*, 10 Ha. App. 71.

(*d*) *Duder v. Amsterdamsch Trustees Kantoor* [1902], 2 Ch. 132.

(*e*) *Re Huinac Copper Mines*, W. N. 1910, 218.

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order if it would be useless (*f*). Although the court has no power of sending its officers to places beyond the jurisdiction to enforce its orders and decrees, a party to the cause who resists them will be guilty of contempt (*g*). A man will not, however, be appointed receiver of an estate which is out of the jurisdiction, unless he is within the reach of the court, or has submitted himself, or is amenable, to its jurisdiction (*h*).

The course which the court usually adopts, where an estate is in a foreign country or out of the jurisdiction, is to appoint a receiver in this country, with power, if it be found expedient, to appoint an agent, with the approbation of the judge, in the country where the estate is situate, to collect the estate and remit the same to the receiver in this country (*i*). The receiver or his agent will recover possession of the estate according to the laws of the country in which it is found (*k*). The receiver will, when necessary be empowered to sell lands abroad, according to a scheme approved by the judge (*l*). Where a receiver in a debenture holder's action was unable to obtain possession of the property, because the courts of the country (Peru) in which it was situate refused to recognise any title other than that of the company, the court ordered the company to

(*f*) *Mercantile Investment Co. v. River Plate Trust* [1892], 2 Ch. 303.

(*g*) *Langford v. Langford*, 5 L. J. Ch. N. S. 60.

(*h*) See *Houlditch v. Ld. Donegal*, 8 Bligh, 344; *Carron Iron Co. v. Maclaren*, 5 H. L. C. 416.

(*i*) *Anon. v. Lindsay*, 15 Ves. 91; *Keys v. Keys*, 1 Beav. 425;

Smith v. Smith, 10 Ha. App. 71; *Hinton v. Galli*, 24 L. J. Ch. 211; Seton, 7th ed. p. 777.

(*k*) *Smith v. Smith*, 10 Ha. App. 71. Consider *Re Maudslay, Sons, & Field* [1900], 1 Ch. 602, 611; and *Re Derwent Rolling Mills Co.*, 21 T. L. R. 81, 701.

(*l*) *Tylce v. Tylce*, Seton, 7th ed. p. 777.

appoint attorneys to take possession on behalf of the receiver (*m*). Chap. III.

Where debentures charge all the property and assets of a company, including its uncalled capital, the order appointing a receiver usually directs that all books and documents relating to such property and assets be handed over to the receiver. But, if the company is wound up, the liquidator is entitled to the custody of such books and documents as relate to the management and business of the company and are not necessary to support the title of the holders of the debentures, and the court will order the delivery of these books and documents to the liquidator, on an undertaking by him to produce them to the receiver (*n*). Books and papers.

(*m*) *Re Huinac Copper Mines, Brewing Co.* [1892], 1 Ch. 442. W. N. 1910, 218 ; security is not required to be given by the attorney in such cases. See further as to what documents are handed to a receiver, *ante*, p. 80.

(*n*) *Engel v. South Metropolitan*

CHAPTER IV.

WHO MAY BE APPOINTED RECEIVERS.

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Party to action.

A RECEIVER appointed in an action should, as a general rule, be a person wholly disinterested in the subject-matter; but it is competent to the court, upon the consent of the parties, to appoint as receiver a person who is mixed up in the subject-matter of the action, if it is satisfied that the appointment will be attended with benefit to the estate. Accordingly, in an action to dissolve a partnership, one of the partners may be appointed receiver (*a*). And in one case a retired partner, who had advanced all the capital and was liable for the partnership debts, was appointed receiver (*b*). So, also, a mortgagee in possession has been appointed receiver (*c*); and, in a modern Irish case, the owner of incumbered lands which had been directed to be sold was appointed, the incumbrancers consenting, to be receiver, but no receiver's fees were allowed him (*d*). Where the appointment is by way of equitable execution it is not unusual to appoint the judgment creditor without salary (*e*).

A party to the action will not be appointed receiver

- (*a*) *Wilson v. Greenwood*, 1 590.
Sw. 471, 483; *Blakeney v.* (*d*) *Re Golding*, 21 L. R. Ir.
Dufaur, 15 Beav. 40, 44; and 194.
see *Davy v. Scarth* [1906], 1 (*e*) See Annual Practice, 1912,
Ch. 55. n. to Ord. L. r. 16, p. 826; and
Pawley v. Pawley [1905], 1 Ch.
Jur. 69. 593.
(*b*) *Hoffman v. Duncan*, 18
(*c*) *Re Prytherch*, 42 Ch. D.

without the consent of the other party or parties, unless a very special case is made out (*f*). But, if the court is satisfied that the appointment of a party to the action will be beneficial to the estate, *e.g.*, in a partnership action, he may be appointed receiver, even though the other, or some other, party does not consent (*g*). In urgent cases, when the order has been made *ex parte*, the plaintiff has been appointed receiver (*h*). And in one case, on the application of an unpaid vendor of the property of a company in voluntary liquidation, and unable from insolvency to carry on its works, the applicant was appointed receiver (*i*).

A party to the action will not usually be appointed receiver unless he undertakes to act without salary (*k*). In partnership cases he is sometimes allowed remuneration (*l*).

When a party to the action is appointed receiver, he does not thereby lose any privilege belonging to him as such party (*m*).

It is not according to the usual course of the court to appoint a trustee to be receiver. As a general rule, a person who is invested with the power, and charged with

Trustee.

(*f*) *Re Lloyd*, 12 Ch. D. 451. As to the appointment of plaintiff in a debenture holder's action subject to the consent of the other debenture holders, see *Budgett v. Improved Furnace Syndicate*, W. N. 1901, 23.

(*g*) *Sargant v. Read*, 1 Ch. D. 600; *Collins v. Barker* [1893], 1 Ch. 578.

(*h*) *Taylor v. Eckersley*, 2 Ch. D. 302; *Hyde v. Warden*, 1 Exch. D. 309; *Fuggle v. Bland*,

11 Q. B. D. 711.

(*i*) *Boyle v. Bettws Llantwit Colliery Co.*, 2 Ch. D. 726.

(*k*) *Wilson v. Greenwood*, 1 Sw. 471, 483; *Blakeney v. Dufaur*, 15 Beav. 40, 44; *Hoffman v. Duncan*, 18 Jur. 69; *Sargant v. Read*, 1 Ch. D. 600; *Re Prytherch*, 42 Ch. D. 590.

(*l*) See *Dary v. Scarth* [1906], 1 Ch. 55.

(*m*) *Scott v. Plutel*, 2 Ph. 229, at p. 230.

Chap. IV. the duty, of acting as a trustee, and is directly connected with the management of the estate, will not be appointed receiver (*n*). The court, on appointing a receiver of a trust estate, looks to the trustee to see that the receiver is doing his duty. The *cestui que trust*, if he is to have a receiver, is entitled to the superintendence of the trustee as a check (*o*). The two characters of trustee and receiver are rarely compatible, and, in addition to this, the appointment of a trustee to act as receiver is, unless he undertakes to act without remuneration, a violation of the fundamental rule of equity that a trustee cannot derive any benefit from the discharge of his duty as trustee (*p*). The court will even remove a receiver whose private interests are in conflict with his duties, notwithstanding that his acts may for the most part have been for the general good of the property, and that a majority in number and value of the incumbrancers on it may desire that he be retained (*q*). The rule against appointing a trustee to be a receiver applies whether he is a sole trustee or is acting jointly with others (*r*).

In special cases, however, where the appointment of a trustee to be receiver will be beneficial to the estate, as, for instance, where he has a peculiar knowledge of the estate, or no one else can be found who will act with the same benefit to the estate, the court will make the appointment. But, although there is no inflexible rule that a trustee can only be appointed receiver upon the

(*n*) *Sutton v. Jones*, 15 Ves. at pp. 587, 588.

(*o*) *Sykes v. Hastings*, 11 Ves. 363; *Sutton v. Jones*, 15 Ves. 587.

(*p*) *Ib.*

(*q*) *Fripp v. Chard Railway*, 11 Ha. 241, 260; cf. *Cookes v. Cookes*, 2 D. J. & S. at p. 530.

(*r*) *Anon. v. Jolland*, 8 Ves. 72.

terms of his having no remuneration (*s*), he will generally be required by the court to undertake to act, if appointed, without any remuneration (*t*). Upon this undertaking a testamentary guardian and executor in one case (*u*), and in another case a tenant for life who was also a trustee, was appointed to act as receiver (*x*).

In *Ames v. Birkenhead Docks* (*y*), the chairman of the trustees of a dock company was appointed receiver of the tolls of the company. Similarly, in *Potts v. Warwick and Birmingham Canal Company* (*z*), one of the committee of management of a company was appointed receiver of the tolls of the company. In *Re Carshalton Park Estate, Ltd.* (*a*) a chartered accountant resident near Birmingham was appointed receiver and manager of a company, the assets of which were a building estate near London, though the appointment of the managing director was desired by another debenture holder.

Where a trustee is willing to act as receiver without salary, he will be allowed to propose himself, but the judge is not bound to accept him (*b*). The court will not appoint a trustee to be receiver, even though he be ready to act without remuneration of any kind, if he is the person who ought to check the receiver for the benefit of the persons beneficially interested (*c*).

Under very special circumstances a trustee may be appointed receiver with a salary. Where, for instance, a

(*s*) *Re Bignell, Bignell v. Chapman* [1892], 1 Ch. 59. 463.

(*y*) 20 Beav. 332.

(*t*) *Sutton v. Jones*, 15 Ves. 584; *Pilkington v. Baker*, 24 W. R. 234.

(*z*) Kay, 143.

(*a*) [1908], 1 Ch. p. 66.

(*b*) *Banks v. Banks*, 14 Jur.

(*u*) *Gardner v. Blane*, 1 Ha. 381. 659.

(*c*) *Sutton v. Jones*, 15 Ves.

(*x*) *Powys v. Blugrave*, 18 Jur. 584.

Chap. IV. testator had appointed as trustee of his estates a person who for many years had been the paid receiver and manager of them, he was continued as receiver with a salary, on the ground of the tenant for life being an infant (*d*).

The objection to the appointment of a trustee, who has active duties to perform in relation to the trust estate, to be receiver over it, does not apply to the case of a trustee to preserve contingent remainders, or with powers of sale and exchange which cannot be immediately exercised (*e*). A trustee with power to lease will, however, as a general rule, be regarded as disqualified for appointment to the office of receiver (*f*).

Party in a
fiduciary
position,
&c.

The rule, that the court will not sanction the appointment as receiver of a person whose duty it is to check and control the receiver, is extended to other persons besides trustees (*g*). Thus it has been held that, as it is the duty of the next friend of an infant to watch the accounts and check the conduct of a receiver of the infant's estate, the two characters are incompatible with each other (*h*); and in *Taylor v. Oldham* (*i*) Lord Eldon held that the son of a next friend ought not to be receiver. Upon similar grounds it has been held that the solicitor of a party having the conduct of an action cannot be appointed receiver, because it will be his duty to check the receiver's accounts (*k*).

(*d*) *Bury v. Newport*, 23 Beav. 30.

(*e*) *Sutton v. Jones*, 15 Ves. 587.

(*f*) *Ib.*

(*g*) See *Cookes v. Cookes*, 2 D. J. & S. 530.

(*h*) *Stone v. Wishart*, 2 Madd.

64. The guardian is, however, sometimes appointed receiver, see Seton, 7th ed. p. 951.

(*i*) Jac. 527, 529.

(*k*) *Garland v. Garland*, 2 Ves. Jr. 137; *Wilson v. Poe*, 1 Hog. 322; cf. *Grundy v. Buckeridge*, 22 L. J. Ch. 1007.

Nor will a man be appointed receiver whose position may cause difficulty in administering justice. Accordingly, a Master in Chancery was disqualified from being appointed a receiver, for, he being an officer whose duty it was to pass the accounts and check the conduct of a receiver, his appointment to be receiver was open to objection on very obvious grounds(*l*). The same reason which disqualified a Master in Chancery from being receiver applies to the appointment of a person who acts as solicitor under a commission of lunacy(*m*). There can be no doubt that it also applies to a Master of the Supreme Court, who is attached to the Chancery Division of the High Court of Justice.

Although a solicitor in an action(*n*), or a solicitor under a commission of lunacy(*o*), cannot be appointed receiver of the estate in relation to which he is acting as solicitor, there is no general objection to the appointment of a solicitor to be receiver(*p*). In *Bagot v. Bagot*(*q*) the solicitor of a married woman was, on her application, appointed receiver of her separate estate, although a strong affidavit was made by her husband, seeking to show the unfitness of the solicitor for the office.

The person appointed to be receiver ought to be one who, consistently with his professional and other pursuits, can spare sufficient time for the duties of his office, and the court will attend to circumstances tending to show that the person appointed as receiver is unable to fulfil

Considerations looked to in making the appointment.

(*l*) *Ex parte Fletcher*, 6 Ves. 427.

(*m*) *Ex parte Pincke*, 2 Mer. 452.

(*n*) *Garland v. Garland*, 2 Ves. Jr. 137; *Re Lloyd*, 12 Ch. D. 449.

(*o*) *Ex parte Pincke*, 2 Mer. 452.

(*p*) See *Wilson v. Po*, 1 Hog. 322; *Della Cainea v. Hayward*, McClell. & Y. 272.

(*q*) 2 Jur. 1063.

Chap. IV. this condition (*r*). Accordingly, in a case where a man proposed as receiver was a member of Parliament and a practising barrister, and also resided at a very considerable distance from the estate, the court held that these circumstances, though not amounting to an absolute disqualification, formed sufficient grounds to render further consideration advisable (*s*). There is no objection to the appointment as receiver of a practising barrister who is not a member of Parliament (*t*).

Peer. The court will not appoint as receiver a person whose privileges protect him from the ordinary remedies which it may become proper to enforce (*u*). A peer, accordingly, is disqualified (*x*). Lord Eldon would not say that a member of the House of Commons was absolutely disqualified (*y*), but the considerations which render the appointment of a peer objectionable appear to apply also to the case of a member of the House of Commons (*z*).

Accountant to Crown, &c. A person who is under security to the Crown is not a proper person to be appointed a receiver. Accordingly, in an old case, the Master in Chancery rightly rejected a person proposed for appointment as receiver of the trust estates of a charity, upon finding that he was receiver-general for the county of Cambridge; for, he having in that capacity given security to the Crown, if he were to become indebted to the Crown and also to the charity, the Crown might by its prerogative process sweep away all his pro-

(*r*) *Wynnev. Lord Newborough*,
15 Ves. 284.

(*s*) *Ib.* 283.

(*t*) *Ib.*

(*u*) *Att.-Gen. v. Gee*, 2 V. & B.
208.

(*x*) *Ib.*

(*y*) *Wynnev. Lord Newborough*,
15 Ves. 284.

(*z*) See *Long Wellesley's Case*,
2 R. & M. 639; *Lechmere Charlton's Case*, 2 M. & C. 316; *Re Armstrong, Ex parte Lindsay*
[1892], 1 Q. B. 327.

perty, with the result that his debt to the charity would be lost (*a*). Upon the same principle it is conceived that the appointment of any person being in the position of an accountant to the Crown would be open to objection (*b*). Chap. IV.

Where an application is made to the court by debenture holders to appoint a receiver, and an application is also made to appoint a liquidator, it is a rule of convenience that the court will take care, in order to avoid trouble and expense, that the receiver and the liquidator shall be one and the same person in every case where that can properly be done (*c*). Accordingly where, after the making of an order to wind up a company and the appointment of a liquidator, the appointment of a receiver is applied for by the plaintiffs in a debenture holders' action, the liquidator will, as a general rule, be appointed receiver (*d*), unless there are special circumstances in the case rendering it undesirable that he should be appointed, *e.g.*, if he has assumed a position of hostility to the debenture holders (*e*). If the judge of first instance has come to the conclusion that there are such circumstances, the Court of Appeal will not overrule the exercise of his discretion (*f*). Liquidator.

A receiver who has been appointed before the commencement of the winding-up of a company is not displaced *ipso facto* by the appointment of a liquidator;

(*a*) *Att.-Gen. v. Day*, 2 Madd. 246, at p. 254.

(*b*) *Dan. Ch. Pr.* 7th ed., p. 1429.

(*c*) *Re Joshua Stubbs* [1891], 1 Ch. 475, at p. 482.

(*d*) *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 420; *Tottenham v. Swansea Zinc Ore Co.*, W. N.

1884, 54; 53 L. J. Ch. 776.

(*e*) *Giles v. Nuthall*, W. N. 1885, 51; see, too, *Boyle v. Bettws, &c., Colliery Co.*, 2 Ch. D. 726; and *Strong v. Carlyle Press* [1893], 1 Ch. 268.

(*f*) *Giles v. Nuthall*, W. N. 1885, 51.

Chap. IV. but the court will usually remove a receiver appointed before the commencement of the winding-up proceedings, or after a winding-up order has been obtained, and appoint the liquidator to act as receiver as well as liquidator, on the ground that the liquidator can, by virtue of the powers vested in him under the Companies Acts, collect and get in the outstanding calls more expeditiously and less expensively (*g*). This, however, is "only a *prima facie* rule of practice; if justice or convenience require it, the rule will be displaced" (*h*). And it will be displaced if there is only a small amount of unpaid capital to be got in. In such a case the court will generally abstain from substituting the liquidator for a receiver, and will allow the receiver to continue to act (*i*). And if the assets of the company are not enough to pay the debenture holders, the court will not remove the receiver in favour of a liquidator who wishes to question the validity of the debentures (*k*).

Where debenture holders have a right under their security to appoint a receiver, a winding-up order coupled with the appointment of a liquidator does not interfere with this right, though it may prevent the receiver from doing various things which he was

(*g*) *Campbell v. Compagnie Générale*, 2 Ch. D. 181.

(*h*) *British Linen Co. v. South American and Mexican Co.* [1894], 1 Ch. 108, *per* Vaughan Williams, J., p. 119; *Bartlett v. Northumberland Avenue Hotel Co.*, 53 L. T. 611. In the former case the receiver was allowed to continue to act in respect of certain assets particularly difficult to realise.

(*i*) *Re Joshua Stubbs* [1891], 1 Ch. 475, 483. See, too, *Re Vimbos, Limited* [1900], 1 Ch. 470, where all the assets, which were of considerable amount, were realised by a receiver appointed by debenture holders shortly before the company went into liquidation.

(*k*) *Strong v. Carlyle Press* [1893], 1 Ch. 268.

authorised to do by the debenture deed, for instance carrying on the business or making a call. There is no case in which the court has appointed the liquidator to act as receiver for debenture holders, except where the debenture holders have themselves come to the court and asked for a receiver. In that case the court, in the exercise of its discretion, will generally appoint the liquidator, as being the most suitable person. But where, under the terms of their security, the debenture holders have a right to appoint their own receiver, and they come to the court insisting on their right, they are entitled to an order giving their receiver liberty to take possession. In such a case the court has no discretion. In *Re Henry Pound, Son, and Hutchins* (l) leave was given to a receiver appointed by a company's debenture holders to take possession of the company's property notwithstanding the appointment of a liquidator, without prejudice to any question as to the receiver's powers, other than the power to take possession of and to sell the property (m). But a power of appointing a receiver conferred by a company's debentures must be exercised *bonâ fide* in the interest of the debenture holders only, and accordingly, in a case in which it had been exercised by the donee of the power, a debenture holder who was also a shareholder, in the interest of the shareholders, the court interfered and appointed its own receiver (n).

Where a judge of first instance has, in the exercise of his discretion, refused to displace a receiver by a liquidator, the Court of Appeal will not, in the absence

(l) 42 Ch. D. 402.

(m) 42 Ch. D. 402.

(n) *Re Maskelyne British Type Writer* [1898], 1 Ch. 133.

Chap. IV. of special circumstances to justify their so doing, interfere with the exercise of that discretion (o).

Where the receiver is not displaced, a question may arise between him and the liquidator as to the custody of the books of the company. A case has already been referred to (p), in which an order dealing with such a question was made.

Official
Receiver.

Where an application is made to the court to appoint a receiver on behalf of the debenture holders or other creditors of a company, the official receiver may be so appointed (q).

Mortgagee
of West
Indian
estate not
appointed
consignee.

The mortgagee of a West Indian estate, who does not take possession, will not be appointed consignee by the court, unless he has stipulated for that advantage. If a mortgagee of a West Indian estate has not a contract that he shall have the consignments, and does not take possession, he cannot have any such emolument from the estate. If that were allowed, the second mortgagee would move for a receiver and consignee and the first mortgagee would be appointed, and thus circuitously obtain an advantage which he could not have obtained directly (r).

(o) *Re Joshua Stubbs* [1891], 1 Ch. 475; *Bartlett v. Northumberland Avenue Hotel Co.*, 53 L. T. 611.

(p) *Engel v. South Metropolitan Brewing Co.* [1892], 1 Ch. 442, cited *supra*, p. 135.

(q) *Companies (Consolidation) Act, 1908* (8 Edw. 7, c. 69), s. 162, replacing *Companies (Winding-up) Act, 1890*, 53 & 54 Vict. c. 63, s. 4, sub-s. 6; see

Deacon v. Arden, 50 L. T. 584, where the official receiver, who contended that he ought to be substituted for a receiver who had been appointed in a foreclosure action before the bankruptcy of the mortgagor, was ordered to be made a defendant.

(r) *Per Lord Eldon in Cox v. Champneys*, Jac. 576; see, too, *Ex parte Pincke*, 2 Mer. 452.

CHAPTER V.

MODE OF APPOINTMENT OF A RECEIVER.

EXCEPT in certain statutory cases (*a*), and in cases of lunacy (*b*), the court has no jurisdiction to appoint a receiver unless an action is pending (*c*). The case of an infant forms no exception from the rule (*d*). In some cases the same person has been appointed guardian and receiver of the person and estate of an infant on petition or summons in chambers without action; and in other cases separate persons have been appointed guardian and receiver on summons in chambers (*e*). The more usual course, however, is to appoint a guardian of the person and estate without a receiver (*f*). The case of a lunatic is the only non-statutory exception from the rule that a receiver will not be appointed unless an action is pending. In the case of a lunatic a receiver may be appointed although no action is pending (*g*).

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Receiver not appointed unless in an action.

A receiver might, under the old practice, be appointed after an administration decree in a suit commenced by summons (*h*).

(*a*) In cases coming within the Railway Companies Act, 1867, 30 & 31 Vict. c. 127, *supra*, p. 70, or the Mortgage Debenture Acts, *supra*, p. 76, a receiver may be appointed on petition.

(*b*) See *supra*, p. 106.

(*c*) *Salter v. Salter* [1896], P. 291.

(*d*) *Ex parte Mountford*, 15 Ves. 445, 449.

(*e*) *Re Leeming*, 20 L. J. Ch. 550; *Re Reynolds*, 19 L. T. 311;

and see Simpson on Infants, 3rd ed. pp. 352—363. The Lord Chancellor of Ireland has power under 5 & 6 Will. 4, c. 78, s. 7, to appoint a receiver over the estate of a minor upon petition. *Re Goode*, 1 Ir. Ch. 256.

(*f*) Seton, 7th ed. pp. 951 *et seq.*

(*g*) *Ex parte Whitfield*, 2 Atk. 315; and see *supra*, pp. 106—111.

(*h*) *Brooker v. Brooker*, 3 Sm. & G. 475.

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A proceeding by originating summons, taken out under R. S. C. Ord. LV. r. 3, being an action within the definition of that word in Ord. LXXI. r. 1, and the Judicature Act, 1873, s. 100 (*i*), a receiver may be appointed in an action properly commenced by originating summons (*k*).

Where the application should be made.

Except in cases of equitable execution, an application for the appointment of a receiver must, as a rule, be made in open court. But where the appointment is by consent, the application for the appointment of a receiver may be made in chambers (*l*). Further, where the application is not an original application for the appointment of a receiver in the action, but is only an application to supply the place of a receiver already appointed, it should be made in chambers (*m*).

Appointment made on motion or petition.

The application for a receiver is usually, except in cases of equitable execution, made on motion, but the appointment may be made on petition (*n*).

Where an action is commenced by originating summons, an application for a receiver may be made, either in chambers or in court, at any time after the service of the summons, and either before or after the making of an order corresponding to a judgment in an action commenced by writ (*o*). It is the more usual course, in the case of an action commenced by originating summons, to make the application by motion in court.

A plaintiff should indorse his writ with a claim for a

(*i*) *Re Fawcitt*, 30 Ch. D. 231. (*m*) *Grote v. Bing*, 20 L. T.

(*k*) *Gee v. Bell*, 35 Ch. D. 160; 124; 1 W. R. 80; 9 Ha. App. *Barr v. Harding*, 36 W. R. 216; 50; *Booth v. Coulton*, 16 W. R. *Weston v. Levy*, W. N. 1887, 76. 683.

(*l*) *Blackborough v. Ravenhill*, 16 Jur. 1085; 22 L. J. Ch. 108. (*n*) See *Bainbridge v. Blair*, 4 L. J. Ch. N. S. 207.

As to practice on appointment see *post*, pp. 158 *et seq.*, and (*o*) *Re Francke*, W. N. 1888, 69; 57 L. J. Ch. 437. Seton, 7th ed. p. 737.

receiver, where to obtain the appointment of a receiver is a substantial object of the action (*p*); but a receiver may be appointed although not claimed by the indorsement on the writ (*q*). Chap. V.

An application for a receiver may be made to the court or a judge by any party (*r*). It is provided by R. S. C. Ord. L. r. 6, that, if the application is by the plaintiff, it may be made either *ex parte* or with notice, and, if it is by any other party, then on notice to the plaintiff and at any time after appearance by the party making the application. The rule does not state that an *ex parte* application may be made by a defendant, but it is conceived that, in an urgent case, a defendant may obtain the appointment of a receiver on such an application (*s*). Mode of application for receiver.

It is only in cases of emergency that a receiver is appointed by the court upon an *ex parte* application (*t*), even after judgment (*u*). If there is any risk of the respondent defeating the applicant's object by making away with the property on being served with notice of application for a receiver, the court will appoint a receiver *ex parte* (*r*). But if, in such a case, the applicant will be sufficiently protected, pending the hearing of the application, by an injunction, the court

(*p*) *Colebourne v. Colebourne*, 1 Ch. D. 690; *Re Wenge*, W. N. 1911, 129.

(*q*) *Norton v. Gover*, W. N. 1877, 206; *Salt v. Cooper*, 16 Ch. D. 544.

(*r*) See *Carter v. Fey* [1894], 2 Ch. 541, for instances in which the application may be made by a defendant.

(*s*) See *Hicks v. Lockwood*,

W. N. 1883, 48.

(*t*) *Caillard v. Caillard*, 25 Beav. 512.

(*u*) *Lucas v. Harris*, 18 Q. B. D. 127, 134; *Re Potts* [1893], 1 Q. B. 648; *Re Goudie* [1896], 2 Q. B. 481; *Re Connolly Bros., Ltd.* [1911], 1 Ch. p. 742.

(*v*) *Evans v. Lloyd*, W. N. 1889, 171; *Minter v. Kent, &c., Land Society*, 72 L. T. 186.

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usually grants an interim injunction in preference to appointing a receiver *ex parte*.

Practice on application for receiver by way of equitable execution.

Where the appointment of a receiver is sought by way of equitable execution, the application is made in the King's Bench Division by summons in Chambers (*w*). In the Chancery Division it was formerly made on motion, but it seems that now it should be made by summons (*x*) in the action in which judgment has been obtained; a fresh action is not necessary (*y*). In the King's Bench Division a master (*z*) has jurisdiction by virtue of R. S. C. Ord. LIV. r. 12 (e), to make the appointment and to grant an injunction so far as is ancillary or incidental to equitable execution. The usual practice is to apply for a summons *ex parte* on an affidavit of facts which should state: (1) Date and particulars of the judgment; (2) particulars and result of any execution which has been issued, stating nature of sheriff's return; (3) if defendant has no property which can be taken by legal execution; reasons why legal execution would be futile if he has such property (*a*); (4) particulars of the property over which a receiver is sought; (5) name and address of proposed receiver (*b*). If the affidavit is sufficient, leave is given to issue a summons returnable in about seven days, and if the judge or master is satisfied

(*w*) For form of summons, see R. S. C. App. K. No. 61A.

similar powers, R. S. C. Ord. XXXV. r. 6.

(*x*) *Re Hartley*, W. N. 1892, 49; for an instance where the application was by motion, see *Pawley v. Pawley* [1905], 1 Ch. 593.

(*a*) It is not necessary to prove that legal execution has been exhausted if it is shown that it would be futile; see *Hills v. Webber*, 17 T. L. R. 513.

(*y*) *Salt v. Cooper*, 16 Ch. D. 544; *Smith v. Corwell*, 6 Q. B. D. 75.

(*b*) See Annual Practice, n. to Ord. L. r. 16; and Chitty F. 490.

(*z*) A district registrar has

by the affidavit that there is danger of the property being made away with by the judgment debtor an injunction will be granted pending the hearing of the summons in the form annexed to R. S. C. Appendix K. No. 61A; a case of jeopardy must be established by the affidavit (*c*). Where the defendant has not appeared it is not sufficient to file the summons at the Central Office, it must be served on the defendant or leave obtained for substituted service (*d*). For the practice when the judgment debt is small see p. 59, *supra*.

A county court judge has jurisdiction to appoint a receiver by way of equitable execution over an equitable interest in land (*e*).

An action in the Chancery Division by a creditor who has recovered judgment in the King's Bench Division is *primâ facie* so vexatious as to render him liable for the costs of such second action; but if the mere appointment of a receiver will not give the judgment creditor the remedy to which he is entitled, *e.g.*, where there are accounts to be taken between him and the judgment debtor, or if it is necessary to take proceedings in the name of the person having the legal right to sue, the action for a receiver may properly be brought in the Chancery Division (*f*).

(*c*) *Lloyds Bank v. Medway Upper Nav. Co.* [1905], 2 K. B. 359. For an injunction granted in Ch. D., see *Westhead v. Riley*, 25 Ch. D. 413; and see *Archer v. Archer*, W. N. 1886, 66. For practice of granting injunctions in the Probate Division in lieu of a receiver, see *Bullus v. Bullus*, 102 L. T. 399.

(*d*) *Tilling v. Blythe* [1899],

1 Q. B. 557. In practice, however, in the K. B. D., strict personal service is not insisted on if it is shown that the summons has come to the knowledge of the judgment debtor.

(*e*) *R. v. Selfe* [1908], 2 K. B. 121.

(*f*) *Proskauer v. Siebe*, W. N. 1885, 159.

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It may here be observed that where a judgment creditor seeks an order for sale under section 4 of the Judgments Act, 1864 (27 & 28 Vict. c. 112), the rules of the Supreme Court expressly provide that the application is to be made by originating summons (*g*).

Parties.

The appointment of a receiver is subject to the ordinary rule that equitable relief can only be granted when the proper parties are before the court (*h*). A creditor, for instance, who has obtained judgment against a debtor in an action against the debtor and another, cannot as of right and *ex parte*, after the death of the debtor, obtain an order appointing a receiver of the interest of the deceased debtor in real estate for the purpose of satisfying the judgment debt, the person on whom that real estate has devolved not being a party to the proceedings (*i*). In cases of emergency, however, a receiver may sometimes be appointed after the death of a sole defendant; thus where in a creditor's action against an executrix for administration, judgment had been pronounced, and a summons for the appointment of a receiver had been taken out, but pending the summons the executrix died, and there was evidence that the estate needed immediate protection, the court, on the application of the plaintiff, appointed a receiver, with powers limited in duration until ten days after the appointment of an administrator *de bonis non*, the plaintiff undertaking to use all possible speed in obtain-

(*g*) R. S. C. Ord. LV. r. 9 (*b*). See *Re Harrison and Bottomley* [1899], 1 Ch. 465, at p. 477; *Re Nixon*, W. N. 1886, 191, where a judgment creditor's application by petition was refused, without prejudice to his right

to apply in the action in which he had recovered judgment.

(*h*) *Re Shephard*, 43 Ch. 131.

(*i*) *Ib.*; and see *Re Cave, Mainland v. Cave*, W. N. 1892, 142; *quere Waddell v. Waddell and Cave* [1892], P. 226.

ing the appointment of himself or some other person as such administrator, and to accept short notice of motion to discharge the receiver (*j*). In a similar case the order was made where the death of the sole executor occurred after judgment (*k*).

The executors of a deceased plaintiff who has recovered judgment cannot apply for the appointment of a receiver under R. S. C. Ord. XLII. r. 23, as such an appointment is not execution within the meaning of that rule and rule 8 (*l*).

A receiver may, under very special circumstances, be appointed even before the service of the writ in an action (*n*). Leave may be obtained, in cases where the circumstances are urgent, to serve the defendant with notice of motion for a receiver along with the writ, or at any time after service of the writ and before the expiration of the time limited for appearance (*n*): but the fact of such leave having been obtained must be mentioned in the notice of motion (*o*). The notice of the motion must be served on the defendant personally or upon his solicitor (*p*): it cannot be filed at the Central Office under

(*j*) *Cash v. Parker*, 12 Ch. D. 294. See, too, *Taylor v. Eckersley*, 2 Ch. D. 302; *Evans v. Lloyd*, W. N. 1889, 171; *Piperno v. Harmston*, 3 T. L. R. 219. In a proper case the court will, on *ex parte* motion, appoint a receiver upon the death of the former receiver. *Re Stone*, Ir. R. 9 Eq. 404; see, too, *Johnson v. Bagley*, Seton, 7th ed. p. 729.

(*k*) *Re Clark*, W. N. 1910, 234; see p. 27, *ante*.

(*l*) *Norburn v. Norburn* [1894],

1 Q. B. 448. *Semble*, they should apply to be added as parties under Ord. XVII. r. 4, before applying for a receiver.

(*m*) *Re H.'s Estate*, II. v. H., 1 Ch. D. 276; Seton, 7th ed. p. 737.

(*n*) R. S. C. Ord. LIII. r. 9.

(*o*) *Hill v. Rimell*, 8 Sim. 632; 2 My. & Cr. 641; *Jacklin v. Wilkins*, 6 Beav. 608.

(*p*) I.e., the solicitor on the record, see *Bagley v. Maple*, 27 T. L. R. 284.

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R. S. C. Ord. LXVII. r. 4, in default of appearance (*q*). The order may be granted on affidavit of service of the notice of motion (*r*). Leave to serve a defendant with notice of motion for a receiver before appearance does not include leave to give short notice of motion. Short notice of motion cannot be given without express leave for that purpose (*s*), and it must appear upon the face of the notice of motion that leave has been obtained to serve it as short (*t*). Leave may be obtained to serve notice of motion for a receiver with an originating summons (*u*).

The rule which requires previous notice to be served on a defendant who has not appeared is subject to an exception, where the defendant has absconded to avoid service and his residence is unknown (*x*). Under the old practice it was held to be also subject to an exception where the defendant was out of the jurisdiction and could not be served (*y*). But inasmuch as, under the present practice, an order may in many cases be made for service of the writ or summons (*z*) in an action on a

(*q*) *Tilling v. Blythe* [1899], 1 Q. B. 557. If, however, leave has been obtained to serve a notice of motion before appearance, Ord. LXVII. r. 2 does not apply: where service on one of two defendants who resided together and who entered appearances shortly after, (both having been served personally with the writ), of a copy for the other of notice of motion for an injunction, was held sufficient service on the latter, *Jarvis v. Hemmings*, W. N. 1912, 33.

(*r*) *Meulen v. Sealey*, 6 Ha.

620.

(*s*) Ord. LII. r. 5; and see *Hart v. Tulk*, 6 Ha. 611.

(*t*) *Dawson v. Beeson*, 22 Ch. D. 504.

(*u*) *Smeed, &c. Co. v. Cumberland*, 31 Sol. J. 659.

(*x*) *Dorling v. Hulsdon*, 14 Beav. 423; *London and South-Western Bank v. Facey*, 19 W. R. 676.

(*y*) *Tanfield v. Irvine*, 2 Russ 149; *Gibbins v. Mainwaring*, 90 Sim. 77.

(*z*) R. S. C. Ord. XI. r. 8A.

party who is out of the jurisdiction (*a*), a receiver will not, it is conceived, be appointed by the court before service, where a party whose interest is sought to be affected by the judgment is out of the jurisdiction but an order for service upon him can be made (*b*), unless his residence is unknown, or the circumstances of the case are urgent.

If a defendant has made an affidavit in the action, he will be considered to have appeared, although no formal appearance has been entered for him, for the purpose of the appointment of a receiver (*c*).

The application for a receiver may be made at any stage of an action, according as the urgency of the case may require (*d*). Where proceedings are already pending, an order for a receiver may be made in those proceedings without any fresh action being brought (*e*).

Receiver appointed at any stage of action.

Under the old practice a receiver was not appointed before decree, unless the bill prayed such appointment, and leave to amend would not generally be given (*f*). But although, under the new practice, if the appointment of a receiver is a substantial object of the action, the writ ought to be so indorsed, still the indorsement may be amended under R. S. C. Ord. XXVIII. r. 1, and upon such amendment the appointment of a receiver may be obtained (*g*).

A receiver might, under the old practice, be appointed at the hearing, although not prayed for by the bill, if the

Receiver appointed at hearing, though not prayed for.

(*a*) R. S. C. Ord. XI.

v. *Bull*, 10 Ch. D. 153.

(*b*) See *Brown v. Blount*, 2 R. & M. 83.

(*e*) *Re Peace and Waller*, 24 Ch. D. at p. 407.

(*c*) *Vann v. Barnett*, 2 Bro. C. C. 158.

(*f*) *Pare v. Clegg*, 7 Jur. N. S. 1136; 9 W. R. 216.

(*d*) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 287; *Bryant*

(*g*) *Colebourne v. Colebourne*, 1 Ch. D. 690.

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facts stated were sufficient to warrant the appointment, and the urgency of the case required it (*h*). And under the present practice the court has the same power of appointing a receiver at the trial of an action as it has on an interlocutory application in it (*i*). A receiver might also, under the old practice, be appointed on motion after decree, in cases of urgency (*k*). For instance, a receiver was appointed after decree in a case where a person, not a party to the cause, had been so long in possession without accounting that there was danger of his acquiring an absolute title by adverse possession (*l*). So, a receiver was appointed after decree in a case where a mortgagee in possession had not shown clearly that anything was due upon his mortgage, and the next estate, being a life estate, was in danger of being lost by the delay, and the possible inability of the first mortgagee to refund if he should be ordered to do so (*m*). So, also, a receiver was appointed after decree in a case where the application could not have been made at the hearing (*n*), and in a case where it appeared by the report that the circumstances would, at the hearing, have entitled the applicant to a receiver (*o*). So, also, a receiver was appointed in a case where, after a decree for sale of land, the defendant, by neglecting to bring in the title-deeds, was preventing the plaintiff from obtaining the benefit of the decree (*p*).

(*h*) *Osborne v. Harvey*, 1 Y. & 175.

C. C. C. 116.

(*n*) *Bainbridge v. Blair*, 4 L. J.

(*i*) *Re Prytherch*, 42 Ch. D.

Ch. N. S. 207.

590.

(*o*) *Att.-Gen. v. Mayor of Galway*, 1 Moll. 94, 104.

(*k*) *Wright v. Vernon*, 3 Drew.

(*p*) *Shce v. Harris*, 1 J. & L.

112.

(*l*) *Thomas v. Davies*, 11 Beav.

91; see, too, *Hacket v. Snow*, 10 Ir. Eq. 220.

29.

(*m*) *Hiles v. Moore*, 15 Beav.

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The application for a receiver might, under the old practice, be granted after decree, although it had previously been refused, if a state of facts entitling the applicant to a receiver were made to appear on the proceedings in the cause(*q*). A receiver might also be appointed after decree, although by the decree further consideration generally(*r*), or some question between the plaintiff and a particular defendant, was reserved(*s*). But, if no subsequent circumstances had occurred, rendering the appointment of a receiver necessary for the protection of the estate or otherwise, a receiver would not, generally, be appointed after decree(*t*).

Under the present practice a receiver may be appointed after judgment(*u*).

Under the old practice a defendant could not apply for a receiver before decree(*x*). And indeed, in *Lloyd v. Passingham*(*y*), where the defendants were in possession under a legal title, the court refused a motion by the plaintiffs for a receiver before the hearing, founded upon evidence which had been taken in the cause. But, under the new practice, a defendant may apply for a receiver before judgment(*z*), even though the plaintiff has already served notice of motion for the like purpose. In such a case one order will be made on the two

Receiver after judgment.

Application for receiver by defendant.

(*q*) *Att.-Gen. v. Mayor of Galway*, 1 Moll. 95, 104.

(*r*) *Hiles v. Moore*, 15 Beav. 175.

(*s*) *Cooke v. Gwynn*, 3 Atk. 689.

(*t*) *Wright v. Vernon*, 3 Drew. 121.

(*u*) *Anglo-Italian Bank v. Davies*, 9 Ch. D. 286; see, too,

Bryant v. Bull, 10 Ch. D. 153. See *ante*, p. 150, as to practice where receiver is sought by way of equitable execution.

(*x*) *Robinson v. Hadley*, 11 Beav. 614.

(*y*) 3 Mer. 697.

(*z*) *Porter v. Lopes*, 7 Ch. D. 358.

Chap. V. motions, but the conduct of the proceedings will generally be given to the plaintiff (*a*). A receiver may be appointed on an *ex parte* application by a defendant who has appeared to the writ (*b*). But in all these cases the relief sought by the defendant must be incidental to or arising out of the relief sought by the plaintiff: if he desires any other relief, he must deliver a counter-claim, or issue a writ in a cross-action, before he can apply for a receiver (*c*).

Affidavits. An application for a receiver must be supported by evidence showing that the appointment is necessary or expedient (*d*). If a statement of claim has been delivered and the application is made before judgment, the affidavits ought to be founded on the allegations in the statement of claim, and, if statements not so founded are introduced into the affidavits, the court may decline to attend to them (*e*). In an Irish case, decided in the year 1845, the court refused to grant the plaintiffs' application for a receiver on the ground of an equity, appearing on the answer, which had not been relied upon in the bill (*f*).

Nomina-
tion of
receiver.

If the applicant satisfies the court of the fitness of his nominee, or if the parties are *sui juris* and agree upon a proper person, the court will at once insert his name in the order; otherwise the person to fill the office is selected in proceedings in the judge's chambers (*g*). In

(*a*) *Sargant v. Read*, 1 Ch. D. 600.

(*b*) *Hick v. Lockwood*, W. N. 1883, 48.

(*c*) *Carter v. Fey* [1894], 2 Ch. 541.

(*d*) See *Middleton v. Dodswell*, 13 Ves. 269. As to form of

affidavit where the appointment is sought by way of equitable execution, see p. 150.

(*e*) See *Dawson v. Yates*, 1 Beav. 306.

(*f*) *Cremen v. Hawkes*, 2 J. & L. 674.

(*g*) *Anderson v. Kemshead*, 16

one case, in which, owing to the urgency of the matter, an order was made for the appointment of a receiver *ex parte*, the plaintiff was appointed receiver (*h*). In a recent case a debenture holder, plaintiff in a debenture holders' action, moved that he might be appointed receiver of the property of the company (of which he was a director), and manager of the company's business. The company had been served, but did not appear. The conditions indorsed on the debentures provided that the money thereby secured should become payable if any writ should be issued against the company at the instance of a creditor: and actions had been commenced against the company for goods sold and delivered. Farwell, J., made the order asked for, subject to production to the registrar of an affidavit that all the other debenture holders consented to the plaintiff being appointed receiver and manager (*i*).

Where a judgment or order is pronounced or made in court appointing a person therein named to be receiver, the court or a judge may adjourn to chambers the cause or matter then pending, in order that the person named as receiver may give security, and may thereupon direct the judgment or order to be drawn up (*k*).

If the person to be appointed receiver is not named in the judgment or order, the appointment is made in chambers. For this purpose a copy of the judgment

Beav. 345; *Lane v. Lane*, 25 Ch. D. 66; *Tillett v. Nixon*, ib. 238.

(*h*) *Taylor v. Eckersley*, 2 Ch. D. 302. In *Davis v. Barrett*, 13 L. J. Ch. 304, the defendant, a mortgagee, was appointed receiver; and see Chapter IV.

(*i*) *Budgett v. Improved, &c.*

Furnace Syndicate, W. N. 1901, 23.

(*k*) R. S. C. Ord. L. r. 17; see *Re Hoyland, &c. Co.*, 53 L. J. Ch. 352. The fee on the order is 10s.; see Order of 1909 as to Supreme Court fees, No. 65A.

Chap. V. or order is left there, and a summons to proceed thereon is issued and served on all parties interested in the usual manner (*l*). On the return of the summons, or at an adjournment thereof, the party having the conduct of the proceedings (*m*) brings into chambers evidence showing the nature and value of the property over which the receivership is to extend, and the fitness of the person proposed by him as receiver (*n*).

If the person proposed as receiver is objectionable, any party interested in the proceedings may propose that some other person be appointed. A stranger to the action cannot propose a receiver (*o*). The proposal must come from a party interested (*p*). The most fit person should be appointed, without regard to the party by whom he has been proposed (*q*). In making the selection the circumstances of the case and the interests of all parties must be taken into consideration (*r*); but, other things being equal, that is, if the parties are equally interested, and the persons proposed on both sides are unobjectionable, the person proposed by the party having the conduct of the proceedings is usually preferred (*s*).

(*l*) R. S. C. Ord. LV. rr. 28, 32. See, for a form of the summons, Dan. Ch. Forms, 5th ed.

(*m*) Where a receiver had been appointed in two administration suits, the carriage of the appointment was given to the plaintiff who first gave notice of motion. *Hart v. Tulk*, 6 Ha. 611.

(*n*) See, for forms, Dan. Ch. Forms, 5th ed.

(*o*) *Att.-Gen. v. Day*, 2 Madd. 246.

(*p*) *Ib.*; *Bagot v. Bagot*, 2 Jur. 1063.

(*q*) *Lespinasse v. Bell*, 2 J. & W. 436.

(*r*) *Wood v. Hitchings*, 4 Jur. 858. If a married woman desires a receiver over her separate estate, she may appoint whom she pleases. An affidavit by her husband, that the person proposed by her is unfit, cannot be attended to. *Bagot v. Bagot*, 2 Jur. 1063.

(*s*) *Wilson v. Poe*, 1 Hog. 322; Dan. Ch. Pr. 1689; see *Baylies v. Baylies*, 1 Coll. 548; *Bord v. Tollemache*, 1 N. R. 177.

In the appointment of a receiver, considerable attention will be given to the recommendations of a testator (*t*).

If an estate over which a receiver is to be appointed is in mortgage, preference will be given to the person proposed by the mortgagee, unless there is some substantial objection to him, although a person proposed by the mortgagor may be more experienced in the duties of the office. It has been said to be an indulgence on the part of a mortgagee of an estate to suffer the owner of the equity of redemption to appoint a receiver (*u*).

A party to the action may propose himself as receiver, if leave to that effect is given and embodied in the judgment or order (*x*). If leave to that effect is not embodied in the judgment or order, a party to the action cannot propose himself (*y*). The judge in chambers can, however, give leave, if the question has not been disposed of in court. If the leave has been refused, a subsequent order giving the leave may, in a proper case, be obtained on summons at chambers (*z*).

Under the old practice of the Court of Chancery, when the appointment of a receiver rested with the Masters in Chancery, it was a settled rule not to entertain any objection to the report of the Master which was not founded on principle (*a*). The court would not interfere

(*t*) *Wynne v. Lord Newborough*, 15 Ves. 283.

(*u*) *Wilkins v. Williams*, 3 Ves. 588; *Tillett v. Nixon*, 25 Ch. D. 239; see, too, *Bord v. Tollemache*, 1 N. R. 177, where the deed contained a provision for the appointment of a receiver by the first mortgagee, and the suit for the appointment of a receiver was instituted by a

second mortgagee.

(*x*) *Meaden v. Sealey*, 6 Ha. 620; *Cookes v. Cookes*, 2 D. J. & S. 526; *Seton*, 7th ed. pp. 729, 739.

(*y*) *Davis v. Duke of Marlborough*, 2 Sw. 118.

(*z*) See, for a form of summons, *Dan. Ch. Forms*, 5th ed.

(*a*) *Cookes v. Cookes*, 2 D. J. & S. 530.

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with the discretion of the Master in the appointment of a receiver, unless some substantial objection could be shown to the appointment (*b*). Under the present practice the Court of Appeal acts on the principles on which the court acted when the old practice was in force, and accordingly will not entertain an application bringing in question the decision of the judge as to the most fit person to be appointed receiver, unless the appointment is open to some overwhelming objection in point of choice, or some objection fatal in point of principle (*c*).

It is a substantial objection to the appointment of a receiver that he has an undue partiality for one of the parties (*d*); but if an order has been made, without any objection on the part of any of the parties, giving liberty to one of the parties to propose himself as receiver, the question is one not of principle, but of judicial discretion with regard had to all the circumstances of the case; and, if the judge appoints the party proposing himself, the Court of Appeal will not interfere with that selection (*e*). The mere fact of the existence of disputes or differences between the parties to an action does not debar the judge from appointing a party to the action to be receiver, where leave to propose himself has been given to that party by the judgment or order (*f*).

Where a receiver has been appointed, the court will not remove him on the mere ground of his being an illiterate person, in the absence of some weightier reason, such as

(*b*) *Tharp v. Tharp*, 12 Ves. 317.

(*c*) *Cookes v. Cookes*, 2 D. J. & S. 530; *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 421; *Nothard v. Proctor*, 1 Ch. D. 4.

(*d*) *Blakeway v. Blakeway*, 2 L. J. Ch. N. S. 75.

(*e*) *Cookes v. Cookes*, 2 D. J. & S. 526, at p. 532.

(*f*) *Cookes v. Cookes*, 2 D. J. & S. at p. 531.

mismanagement, dishonesty, or incompetency to manage the estate (g). Chap. V.

A person appointed to act as receiver must, unless otherwise ordered, first give security, to be allowed by the court or a judge, duly to account for what he shall receive as such receiver, and to pay the same as the court shall direct (h). What security is required from a receiver.

If no security is to be given, it should be so stated in the order; and if no security is to be required until a particular time, the person obtaining the order should be made responsible for the receiver's receipts in the meantime (i).

The appointment of a receiver of the rents of land at the instance of a judgment creditor, though conditional on the receiver's giving security, operates as an immediate delivery of the land in execution; and, when the security is afterwards given, the order relates back to the date when it was made (k). But as regards personalty, it is settled that, when the order is in the form of appointing a receiver upon his giving security, his appointment is not effectual until the security is given. It is a conditional appointment, and the giving of security is a con-

(g) *Chaytor v. Maclean*, 11 L. T. O. S. 2.

(h) R. S. C. Ord. L. r. 16. *Re Pountain*, 37 Ch. D. 609; see, as to receivers in lunacy, the Rules in Lunacy, 1892, rr. 83, 84. A receiver appointed in an action in the Chancery Division commenced in a district registry (other than the Manchester and Liverpool registries, as to which see Ord. XXXV. r. 6A) must give security in London, where,

it seems, he must also pass his accounts, unless the order otherwise directs (see *Re Capper*, 26 W. R. 434); in K. B. actions the receiver both gives security and passes his accounts in the registry.

(i) *Per* Chitty, J., in *Morrison v. Skerne Ironworks Co.*, 60 L. T. 588.

(k) *Ex parte Evans*, 13 Ch. D. 252; and see *Re Shephard*, 43 Ch. D. at p. 133.

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dition precedent (*l*). Accordingly, where, at the suit of an equitable mortgagee, an order was made that M. "upon his giving security be appointed receiver" of certain chattels, and afterwards, but before the security had been given or possession taken by M., some execution creditors of the mortgagor took the chattels in execution, it was held by the Court of Appeal that the taking of the chattels in execution was not a contempt of court (*m*).

If the order is silent as to security and directs the receiver to take possession, he is validly in possession, though no security has been given (*n*).

Except in cases in which the amount for which security is to be given does not exceed 500*l.* (*o*), the security usually required is the recognizance of the receiver with two sureties (*p*), unless, as is now frequently the case, a guarantee society is accepted as surety: in that event, if the amount of the security does not exceed 2,000*l.*, a recognizance is dispensed with and the bond of the receiver and the society accepted. Where the amount exceeds 2,000*l.* a recognizance by the receiver and a bond by the receiver and the society is required.

In the Chancery Division the recognizance is given to the two senior Masters for the time being of the judge to whom the cause or matter is assigned (*q*), and must be

(*l*) *Per* Farwell, J., in *Ridout v. Fowler* [1904], 1 Ch. 658, at p. 662; *affd.* [1904], 2 Ch. 93; and see *Fahcy v. Tobin* [1901], 1 Ir. R. 511.

(*m*) *Edwards v. Edwards*, 2 Ch. D. 291, explained in *Ex parte Evans*, 13 Ch. D. at p. 255. See, too, *Re Roundwood Colliery*

Co. [1897], 1 Ch. 373, at p. 393.

(*n*) *Morrison v. Skerne Iron-works Co.*, 60 L. T. 588.

(*o*) See R. S. C. Ord. L. r. 16A.

(*p*) *Mead v. Lord Orrery*, 3 Atk. 237; Seton, 7th ed. p. 741; *Re Ward*, 31 Beav. 1; Chitty, F. 496.

(*q*) R. S. C. Ord. LX. 4.

taken before a person authorised to administer oaths (*r*). It is usually for double the amount of the annual rental or yearly value of the estate to be collected (*s*). Where debts or outstanding estate are to be got in, security is given to the full, or something beyond the full, amount which is ordered or expected to be received (*t*). With the view of reducing the amount of recognizance, part of the estate may be ordered to be paid into court for safe custody, and security be required only for the rest (*u*). With the same view the receiver may also be restricted from getting in mortgage debts.

Where the amount for which security is to be given does not exceed 500*l.*, such security may be given by an undertaking signed by the receiver and his sureties, or in the case of a guarantee company sealed with its seal or otherwise duly executed: such undertaking must be filed in the central office or district registry (*x*).

In the King's Bench Division the security is given by bond, with the proper Inland Revenue stamp, and the penalty is generally fixed at twice the amount of the gross annual income of the property, or twice the amount of the capital money (if any) likely to be paid to the receiver. There must also be an attendance for the purpose of allowing the sureties and settling the form of the bond, and (unless the surety is one of the usually accepted societies) the usual affidavit of justification must be made by the sureties, and a certificate must be given by the solicitors of the judgment creditor that the sureties are

(*r*) R. S. C. Ord. L. 16; as to form of recognizance, see Appendix L., Nos. 20a, 21.

(*s*) Seton, 7th ed. p. 741.

(*t*) Dan. Ch. Pr. 1432.

(*u*) *Poole v. Wood*, Seton,

7th ed. p. 741; *Ex parte Clayton*, 1 Russ. 476; *Re Eagle*, 2 Ph. 201.

(*x*) R. S. C. Ord. L. r. 16a; for form of undertaking see Appendix L. Form 21A.

Chap. V. respectable and credible persons (*y*). Certain guarantee companies are accepted as sureties, and indeed any guarantee company proof of whose responsibility is given to the satisfaction of the Master. The bond is usually given to two of the Masters of the Supreme Court (*z*).

In a case (*a*), in which the receiver appointed in a debenture-holder's action brought in by way of security a bond of the Railway Passengers' Assurance Company, Limited, for 1,000*l.*, given to two of the Masters, and conditioned to be void if the receiver discharged his duties, a doubt was suggested as to whether the giving of such a bond was within the scope of the company's powers under its special Act, and Farwell, J., declined to accept the security. The Court of Appeal, however, came to the conclusion that there was no reason why the bond should not be accepted.

It is not regular to take, as security for a receiver, an assignment of a mortgage belonging to him (*b*) instead of the usual security. A transfer of Government stock, however (*c*), and the security of a guarantee society (*d*), will be accepted as security for a receiver.

Where the bond of a guarantee society is offered as a security, the Master may require the secretary or other officer of the society to make an affidavit as to the solvency of the society, and as to the mode in which

(*y*) The costs of attending bondsmen and receiver, explaining bond, and on bondsmen on swearing affidavit of solvency ought to be allowed, *Prigme v. Turtle*, 101 L. T. Jo. 232.

(*z*) See the Annual Practice, 1913, nn. to Ord. L. r. 16, where the regulations in the K. B. D. are fully stated. For form of

bond, Chitty, F. 497, 501.

(*a*) *Re Spiritine*, W. N. 1902, 124.

(*b*) *Mead v. Lord Orrery*, 3 Atk. 237.

(*c*) *Betagh v. Concannon*, Smith on Rec. p. 17.

(*d*) *Colmore v. North*, 42 L. J. Ch. 4.

the use of the society's seal is sanctioned by its deed of settlement or articles of association.

Where a person resident in Ireland is appointed receiver by the court here, the security taken is a judgment confessed by him and his sureties in the Court of King's Bench there in favour of the Master of the Rolls and the senior judge of the Chancery Division here, and such judgment is duly docketed and registered there, so as to give a lien on the real estates of the receiver and sureties (*e*).

The bond of a foreign company may be accepted as security in a proper case; there is no rule of practice prohibiting the acceptance of such security (*f*).

If a Scottish guarantee company submits by its bond to the jurisdiction of the English courts, and signs an address for service within the jurisdiction, the security of such company may be accepted in the same way as that of an English company (*g*).

Where the property over which a receiver has been appointed has increased in value during the receivership, additional security has been required to be given by him (*h*). Upon any event, such as death or bankruptcy, happening which would prevent the recognizance being effectually put in force against the sureties, an order will be made at chambers, on summons, directing the receiver to give a new security (*h*).

Where a receiver has been appointed until judgment or further order, and he is continued by the judgment,

(*e*) Seton, 4th ed. 427.

(*f*) *Aldrich v. British Griffin Chilled Iron and Steel Co.* [1904], 2 K. B. 850, a case of security for costs, but the decision appears applicable also to the

case of security for a receiver.

(*g*) Resolution of judges of Chancery Division, of the 5th July, 1909.

(*h*) Seton, 7th ed. p. 742.

Chap. V. this is practically a new appointment, and further security must be given (*i*) unless, as is usually the case, the security originally given is made applicable to any continuation of the appointment.

The court will not in ordinary cases dispense with the usual security, even with the consent of the parties interested (*k*). But if all the parties interested are competent, and agree, to appoint a receiver of their own authority and not by the authority of the court, the court may allow him to act even without recognizance (*l*). In a case where a testator had by his will directed that a named person should be appointed receiver of his real and personal estates, stating that he intended by the appointment to give him a pecuniary benefit, the court appointed that person to be receiver and agent of the estates (the testator's only real estate being in the West Indies) on his own personal recognizance only (*m*); and even in a case where all the parties were not competent to consent, the circumstance that the person proposed for receiver had been employed by the testator to manage his estates was held to be a reason for dispensing with sureties, and appointing him receiver of the estates on his own personal recognizance only (*n*). But in *Tylee v. Tylee* (*o*) the court declined to dispense with the usual security, some of the parties being not *sui juris*, and, therefore, incapable of giving consent.

It is not unusual, where no salary is given to the

(*i*) *Brinsley v. Lynton Hotel Co.*, W. N. 1895, 53.

(*k*) *Manners v. Furze*, 11 Beav. 30.

(*l*) *Manners v. Furze*, 11 Beav. 31.

(*m*) *Hibbert v. Hibbert*, 3 Mer. 681.

(*n*) *Carlisle v. Berkeley*, Amb. 599; see, too, *Wilson v. Wilson*, 11 Jur. 793.

(*o*) 17 Beav. 583.

receiver, to dispense with the security (*p*). So, security may be dispensed with where the party appointed receiver will only have to incur expenditure (*q*). So, also, security was dispensed with where the order appointing a receiver was made merely for the purpose of creating a charge upon the debtor's property subject to prior incumbrances, and the receiver was not to go into possession or receive anything (*r*).

When the person proposed for appointment as receiver has been chosen, the amount of his security is fixed, and the persons proposed to be his sureties are approved. Persons in partnership with the receiver, and the solicitor in the action, are usually rejected as sureties for a receiver (*s*).

In urgent cases, where there is evidence of immediate danger to the property, and there is no time for the receiver to complete his security, an interim receiver may be appointed without security for a limited period, or until a receiver is appointed under a reference to chambers for that purpose, upon the undertaking of the person so appointed interim receiver, if he be the plaintiff, not to deal with the property except under the direction of the court, and to abide by any order which the court may think fit to make as to damages or otherwise (*t*). In March, 1900, it was announced by

Interim
receiver
without
security.

(*p*) *Gardner v. Blane*, 1 Ha. 381; *Re Prytherch*, 42 Ch. D. 590; see, too, 24 W. R. 234.

(*q*) *Hyde v. Warden*, 1 Ex. D. 309, at p. 310; *Boyle v. Bettors Llantwit Colliery Co.*, 2 Ch. D. 726; *Fuggle v. Bland*, 11 Q. B. D. 711.

(*r*) *Hewett v. Murray*, W. N.

1885, 53; 54 L. J. Ch. 573. For form of order appointing a receiver by way of equitable execution without security, see S. C. 52 L. T. 380.

(*s*) Dan. Ch. Pr. 1689.

(*t*) *Taylor v. Eckersley*, 2 Ch. D. 302; 5 Ch. D. 741; *Cash v. Parker*, 12 Ch. D. 293.

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Stirling, J., on behalf of all the judges of the Chancery Division of the High Court, that the undertaking given by the plaintiff in a debenture holders' action, on the appointment of a receiver who is to act at once, is to be so framed as to extend to all liabilities which would be covered by the security when completed, and not only to the receiver's receipts (*u*). It had previously been held that, where the case is urgent and there is no time for the receiver to complete his security, the party moving the court must enter into an undertaking as to damages and for the receipts of the receiver (*x*), or must undertake that the person appointed receiver shall give such security as the court can enforce, that he will preserve intact the property of which he is appointed receiver (*y*).

Recogni-
zance of
receiver
and
sureties.

After the approval of the person proposed as receiver and the persons proposed as his sureties, the receiver's solicitor prepares a draft recognizance, and engrosses it after it has been settled by the Master (*z*). The recognizance must then be taken before some person authorised to administer oaths (*a*); and each surety must also make an affidavit that he is worth the amount for which he is bound after payment of all his just debts (*b*). If any doubt exists as to the sufficiency or

(*u*) *Re Debenture holders' Actions*, W. N. 1900, 58. It is usual to order in such cases that the security shall be completed within a given time, and it is the practice of some judges to order that unless security is completed within the time specified the appointment shall lapse.

(*x*) *Evans v. Lloyd*, W. N. 1889, 171.

(*y*) *Re Patrick*, 32 Sol. J. 798; 85 L. T. 398.

(*z*) Dan. Ch. Pr. 7th ed. p. 1435.

(*a*) *Ib.*

(*b*) *Ib.*; as to form of affidavit, see Dan. Ch. Forms, 5th ed.

solvency of the sureties, the opposing solicitor has a right to attend at the time appointed for acknowledging the recognizance, and to examine the sureties on these points (*c*). Chap. V.

The recognizance and an office copy of the affidavit of the sureties having been left at chambers, a memorandum of the allowance of the recognizance is written in the margin of the recognizance, and is signed by the Master (*d*).

The recognizance or bond is then sent from the chambers of the judge to the enrolment office in the Chancery department of the central office, and a receipt is taken for it from the proper officer (*e*). The bond or recognizance must be filed and is kept as a record until vacated (*f*).

Formerly, enrolment was necessary within six months of the acknowledgment; under special circumstances (*g*), leave might be had from the court to enrol it *nunc pro tunc* (*h*): but an order giving such leave was framed so as not to prejudice intervening incumbrancers, if any (*i*).

The appointment of a receiver is not, however, necessarily completed by the filing of the recognizance. Unless the receiver is named in the original order, a further order must be made at chambers, appointing the person approved at chambers to be receiver pursuant

(*c*) Smith on Rec. 18.

(*d*) Dan. Ch. Pr. 7th ed. p. 1435; as to form of memorandum, see Dan. Ch. Forms, 5th ed.

(*e*) Dan. Ch. Pr. 7th ed. p. 1435.

(*f*) R. S. C. Ord. LXI. r. 8A.

Enrolment was formerly necessary but is so no longer.

(*g*) R. S. C. Ord. LXI. 14.

(*h*) *Vaughan v. Vaughan*, 1 Dick. 90.

(*i*) *Bothomley v. Fairfax*, 1 P. W. 340; *Blois v. Betts*, 1 Dick. 336; *Seton*, 7th ed. p. 742.

Chap. V. to the order, and fixing the periods at which he is to pass his accounts and pay the balances due from him thereon (*k*). This order is generally made upon the summons to proceed upon the order directing the appointment of a receiver, and a further summons is usually dispensed with (*l*). The order is drawn up by the registrar in the usual manner, and completes the appointment.

Completion
of appoint-
ment of
receiver.

When the receiver is named in the order made on an application to appoint a receiver, his appointment is usually made conditional upon his giving security. A copy of the order is left at chambers, and a summons to settle the security is issued and served on the parties interested (*m*); and thereupon the amount of the security to be given is settled, and the recognizance is approved, completed, and enrolled in the manner already described (*n*). The Master then issues a certificate that security has been given, and this, when adopted by the judge and filed, completes the appointment, and no further order is necessary.

Formerly, the order for the appointment of a receiver was completed by the Chancery registrars, and then the parties went before the Chief Clerk on the question of the receiver giving security. Now the registrar frequently issues a memorandum to the effect that the matter is adjourned to the Master for the purpose of completing the security. This done, the Master sends to the registrar a memorandum to that effect, and the receiver's

(*k*) Dan. Ch. Pr. 7th ed. p. 1435.

p. 1435; as to form, see Dan. Ch. Forms, 5th ed.; Seton, 7th ed. p. 726.

(*m*) Dan. Ch. Pr. 7th ed. pp. 1435, 1436.

(*n*) *Supra*, p. 171.

(*l*) Dan. Ch. Pr. 7th ed.

solicitor produces to the registrar the receipt of enrolment, and then the registrar completes the order.

On an application at chambers to appoint a receiver, the expense of a certificate in addition to an order may be saved by the recognizance being completed and filed before an order is drawn up. In such a case, the recognizance should recite that the judge has approved the proposed receiver subject to his giving security, instead of reciting the order directing a receiver to be appointed; and the order should, after reciting that the recognizance has been given, appoint the receiver, and fix the days for him to bring in his accounts and pay his balances (*o*).

The costs incurred with reference to the completion of the security of the receiver, and subsequent thereto, are in the first instance paid by the receiver, and will be allowed him in passing his first account (*p*). But the premiums paid by the receiver to a guarantee society which has become his surety will not be allowed, unless he is acting without salary (*q*).

A receiver is sometimes appointed until judgment or further order, but very often no limit of time is fixed though a limit is always fixed in the appointment of a manager. Where no limit of time is fixed in the order appointing a receiver, it is not necessary for the judgment to direct that he be continued (*r*); but where he is

(*o*) Dan. Ch. Pr. 7th ed. p. 1436.

(*p*) *Ib.* As to costs where an ignorant person had been induced by the misrepresentations of the plaintiff to consent to act as receiver, and afterwards, on discovering the nature of the

office, refused to enter into the recognizance, see *Hunter v. Pring*, 8 Ir. Eq. 102.

(*q*) *Harris v. Sleep* [1897], 2 Ch. 80. ✓✓

(*r*) *Davies v. Vale of Evesham Preserves*, W. N. 1895, 105; 43 W. R. 646.

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appointed only until judgment or further order, if he is to continue to be receiver the judgment must so direct, and, as this is practically a new appointment, further security must be given (*s*), unless, as is usually the case, the security originally given is made applicable to any continuation of the appointment.

An order refusing to appoint a receiver is a matter of practice and procedure, from which an appeal will not lie without leave (*t*) ; but by section 1 (b) (2) of the Judicature Act, 1894, an appeal lies without leave from an order appointing a receiver.

(*s*) *Brinsley v. Lynton Hotel* (*t*) *Hood Barrs v. Cathcart*, 11
Co., W. N. 1895, 53 ; 2 Manson, T. L. R. 262.
244.

CHAPTER VI.

EFFECT OF THE APPOINTMENT AND POSSESSION OF A RECEIVER.

IN appointing a receiver the court takes possession, by the hands of its officer, of the property over which the receiver is appointed. A receiver duly appointed by the court is, from the date of his appointment, an officer and representative of the court (*a*); but he is not legally clothed with that character, or able to perform the duties of his office, until he has given security and his recognition has been perfected (*b*). Chap. VI.

When, however, as may be done in urgent cases, an interim receiver is appointed for a limited time without security, he becomes an officer of the court, and is legally clothed with that character, from the date of his appointment (*c*). So, also, where the order appointing a receiver with power to take possession does not direct that he shall give security, and the receiver takes possession accordingly, the appointment is complete, even though he is subsequently continued as receiver by an order requiring security to be given (*d*).

(*a*) *Aston v. Heron*, 2 M. & K. 391; *Owen v. Homan*, 4 H. L. C. 1032; see *Re Glaslir Copper Mines* [1906], 1 Ch. 365; *Davy v. Scarth* [1906], 1 Ch. 55; *Boehm v. Goodall* [1911], 1 Ch. 155; *Viola v. Anglo-American Cold Storage Co.* [1912], 2 Ch. 305.

(*b*) *Defries v. Creel*, 34 L. J. Ch. 607; *Edwards v. Edwards*, 2 Ch. D. 291. See, too, *Ridout v. Fowler* [1904], 1 Ch. 658; *affd.* [1904], 2 Ch. 93.

(*c*) *Taylor v. Eckersley*, 2 Ch. D. 302; 5 Ch. D. 741.

(*d*) *Morrison v. Skerne Iron-*

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Parties
removed
from pos-
session by
appoint-
ment of
receiver.

The effect of the appointment of a receiver is to remove the parties to the action from the possession of the property. If, indeed, at the time when a receiver is appointed, a party claiming a right in the subject-matter of the appointment, under a title paramount to that under which the receiver is appointed, is in possession of the right which he claims, the appointment of the receiver leaves him in possession (*e*), but parties to the action, who are not in possession under a paramount title, are removed from possession by the appointment of a receiver. If a party to the action is appointed receiver, the same rule obtains. In a case where the chairman of the trustees of a dock company was appointed receiver of the tolls, it was held that his appointment had removed the trustees from the possession and receipt of the tolls (*f*).

But receivers and managers are merely custodians of the property of which they take possession. Their relation to the person who has given up possession to them is not that of incoming and outgoing tenant, or purchaser and vendor, but that of caretaker and owner: consequently they cannot claim to be supplied with gas without paying off arrears owed by the person who has given up possession to them (*g*); nor is their entry into possession, under an order appointing them but not directing delivery-up of possession to them, a change of occupation within s. 16 of the Poor Rate Assessment and Collection Act, 1869, so as to exempt them from arrears

works Co., 60 L. T. 588; 33 Sol. J. 396.

(*e*) *Erclyn v. Lewis*, 3 Ha. 472; *Bryant v. Bull*, 10 Ch. D. 155.

(*f*) *Ames v. Birkenhead Docks*, 20 Beav. 350.

(*g*) *Paterson v. Gas Light and Coke Co.* [1896], 2 Ch. 476.

of rates owing by a company, the debenture holders of which have procured the appointment (*h*). Chap. VI.

In a debenture holders' action the court had made an order appointing a receiver of the undertaking of a hotel company, and directing the company to deliver to the receiver possession of the company's hotel "as far as is necessary for the purpose of such receivership." The receiver had entered, but had not paid a sum of 437*l.* 2*s.* which, at the time of his entry, was due from the hotel company to an electric company for electric current supplied for lighting the hotel. It was held by the Court of Appeal that, whether the receiver's possession constituted a new occupation of the hotel or not, the electric company was entitled, under the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), to discontinue the supply of current until the receiver should have entered into a contract with the electric company for the supply (*i*).

When sequestrators are in possession of lands or tenements in question in an action, the appointment of a receiver of the rents and profits of those lands will have the effect of discharging the sequestration (*k*). Similarly, the appointment of a receiver in an action has been held to put an end to the power of a trustee appointed for the benefit of creditors to collect the rents (*l*).

Where, in an action to enforce an agreement by the

(*h*) *Re Marriage, Neave & Co.* [1896], 2 Ch. 663, 678, in which case *Richards v. Overseers of Kidderminster* [1896], 2 Ch. 212, was considered by the Court of Appeal.

(9 Edw. 7, c. 34), which enables an electric light company to refuse to continue to supply electricity to any person not agreeing to pay a minimum annual charge.

(*i*) *Husey v. London Electric Supply Corporation* [1902], 1 Ch. 411. See also section 5 of the Electric Lighting Act, 1909

(*k*) *Shaw v. Wright*, 3 Ves. 22, 24; *Reeves v. Cox*, 13 Ir. Eq. 247.

(*l*) *M'Donnell v. White*, 11 H. L. C. 570.

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defendant to give a bill of sale of sundry chattels, an interim receiver of the chattels was appointed and took possession, and very soon afterwards the defendant became bankrupt, it was held that the possession of the receiver had taken the chattels out of the order and disposition of the bankrupt at the time of his bankruptcy (*m*). But the appointment of a receiver of the book debts of a trader who is afterwards adjudicated bankrupt does not take them out of the order and disposition of the bankrupt, unless the appointment is followed by notice to the debtors within a reasonable time (*n*).

Right not
affected
by the
appoint-
ment.

The appointment of a receiver does not in any way affect the right to the property over which he is appointed. The court, in an action for a receiver, deals with the possession only, until the right can be determined, if the right is the matter in dispute between the parties, or until the incumbrances have been cleared off, if the appointment has been made at the instance of an incumbrancer. Where the right is the matter in dispute, the receiver merely holds the property for whoever may ultimately be held to be entitled to it. If the appointment has been made on the application of an incumbrancer, the court, when the incumbrance has been cleared off, restores the possession to him from whom it was taken. The title is in no way prejudiced, in theory or principle, by the appointment (*o*).

The appointment of a receiver and manager, and even the sale by him and payment into court of the proceeds

(*m*) *Taylor v. Eckersley*, 5 564; *Wells v. Kilpin*, L. R. 18 Ch. D. 741. Eq. 298; and see *Moss SS. Co.*

(*n*) *Rutter v. Everett* [1895], 2 v. *Whinney* [1912], A. C. 254. Ch. 872. Where an order for the dis-

(*o*) *Sharp v. Carter*, 3 P. W. charge of a receiver has been 379; *Skip v. Harwood*, 3 Atk. made, and he continues in

of property subject to the trusts of a debenture trust deed, does not necessarily determine the right of the trustees to remuneration and a lien therefor. The terms of the trust deed must be considered in each case (*p*).

Where two directors of a company, who were entitled to a share in certain sums payable for remuneration to the whole body of directors, had been appointed receivers and managers of the company's business, and had become entitled to remuneration for so acting, it was held that they were nevertheless entitled to their remuneration as directors up to the date of a winding-up order (*q*).

The rights of the parties to an action are not interfered with by the appointment of a receiver. The possession of the receiver cannot, of itself, be held to put the tenant out of occupation (*r*). The appointment by the court of a receiver over the estate of a defendant does not change the correlative rights of landlord and tenant previously subsisting between the defendant and his tenants, though the court thereby acquires additional powers of enforcing the landlord's rights (*s*). In *Thomas v. Brigstocke* (*t*), where a mortgagee petitioned to be paid the rents of the mortgaged premises, which had

possession after the date of his discharge, his possession is the possession of the party entitled. *Horlock v. Smith*, 11 L. J. Ch. N. S. 157.

(*p*) *Re Piccadilly Hotel, Ltd.* [1911], 2 Ch. 534; see also *Palmer's Company Precedents*, 10th ed. Part III. p. 736.

(*q*) *Re South Western of Venezuela Ry. Co.* [1902], 1 Ch. 701.

(*r*) *Moir v. Blacker*, 26 L. R. Ir. 378.

(*s*) *Commissioners of Church Temporalities v. Harrington*, 11 L. R. Ir. 128.

(*t*) 4 Russ. 65. A receiver appointed out of court by a first mortgagee is not entitled to rents as against a receiver appointed by the court in an action by the second mortgagee, until the first mortgagee applies to the court to displace its receiver. *Re Metropolitan Amalgamated Estates*, W. N. 1912, 219.

Chap. VI. been paid into court by a receiver in a suit to which the mortgagee was no party, he having given notice to the tenants not to pay their rents, it was held that his notice to the tenants did not operate to divest the possession of the receiver, which was the possession of those who claimed under the will of the mortgagor. So, also, the appointment of a receiver in an action will not prevent the operation of the Statute of Limitations against a rightful owner who is out of possession and is not a party to the action (*u*); nor will it interrupt the possession of a stranger, so as to prevent the Statute of Limitations from conferring a title on him (*x*). Nor is a right to damages which has already accrued taken away by the appointment, by consent, of a receiver (*y*).

A receiver of lands never takes actual possession: he only receives the rents (*z*), unless the order appointing him specifically directs him to take possession, though if the circumstances of the case render it necessary actual possession may be given to him (*a*). Nor does he receive the rents by virtue of an estate or title vested in him. He is merely an officer of the court, to collect the rents upon the title of certain persons, who are parties to the action (*b*). A receiver appointed by the court is not an "owner" within the meaning of s. 4 of the Public

(*u*) *Harrison v. Duigman*, 2 Dr. & War. 295. Comp. *Wrixon v. Vize*, 3 Dr. & War. 123.

(*x*) *Groom v. Blake*, 6 Ir. C. L. 401; 8 Ir. C. L. 432. As to payment by a receiver taking the demand out of the Statute of Limitations, see *infra*, Chap. VII., p. 234.

(*y*) *Dreyfus v. Peruvian Guano*

Co., 42 Ch. D. 66; [1892], A. C. 166.

(*z*) *Ex parte Evans*, 13 Ch. D. 255, *per James*, L.J.; see also *Re Marriage, Neave & Co.* [1896], 2 Ch. 663.

(*a*) See *Charrington v. Camp* [1902], 1 Ch. 386.

(*b*) *Vine v. Raleigh*, 24 Ch. D. 243, *per Chitty*, J.

Health Act, 1875(c); nor is a receiver, appointed by a Chap. VI. mortgagee, within section 4 of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21)(d).

An order for the appointment of a receiver by way of equitable execution has the effect of entitling the judgment creditor, in whose favour it has been made, to goods or the proceeds of them as and from the date on which it was made, subject only to the discharge of any lien on them which was a legal impediment to execution(e).

The possession of a receiver appointed in an action is the possession of the court; therefore a plaintiff cannot claim damages for the detention of any goods whilst they are in the hands of a receiver so appointed. Any damage which the plaintiff may suffer thereby is due to the law's delay, and not to any wrongful act of the defendant(f).

The possession of the court by its receiver is the possession of all parties to the action according to their titles(g). The appointment of a receiver of property is for the benefit not of the plaintiff only, but of all persons who may establish rights in the property. The receiver is not the particular agent of any party: he is the officer of the court(h). A receiver appointed in a partnership

(c) *Corporation of Barup v. Smith*, 44 Ch. D. 395. see *Re Goldbury* [1912], 1 K. B. 606 and p. 346, *post*.

(d) *Metropolitan Water Board v. Brooks* [1911], 1 K. B. 289. (g) *Re Butler*, 13 Ir. Ch. 456; *Bertrand v. Davies*, 31 Beav. 436;

(e) *Levasseur v. Mason & Barry* [1891], 2 Q. B. 73. see *Penney v. Todd*, 26 W. R. 502; *Moir v. Blacker*, 26 L. R.

(f) *Peruvian Guano Co. v. Ir.* 378.

Dreyfus Brothers [1892], A. C. 166. As to liability in trespass of a receiver appointed by debenture holders out of court, (h) See *Re Newdigate Colliery Co.* [1912], 1 Ch. 468; and Chap. XIII., *post*, p. 308.

Chap. VI. action is not a person having "the control or management of the partnership business," upon whom a bankruptcy notice can be served by a creditor of the firm: he is not the agent of the parties (*i*). It is not correct to say that money in the hands of a receiver is *in custodia legis*, in the same way as if it were in the hands of a sequestrator (*k*). The appointment of a receiver is for the benefit of incumbrancers only so far as expressed to be for their benefit, and as they choose to avail themselves of it (*l*). If a mortgagee claiming under a title paramount to that under which the receiver has been appointed suffers the receiver to pay away the surplus rents to the beneficial owner, or to apply them for purposes other than the satisfaction of his security, he is not entitled to a retrospective account of rents and profits (*m*). Where, however, in an action by second mortgagees against the mortgagor, to which the first mortgagee is not a party, a receiver of the rents of

(*i*) *Re Flowers & Co.* [1897], 1 Q. B. 14; and see *Boehm v. Goodall* [1911], 1 Ch. 155, *ante*, p. 104.

(*k*) *Re Hoare, Hoare v. Owen* [1892], 3 Ch. 94, disapproving *Delaney v. Mansfield*, 1 Hogg. 235. Where a receiver is ordered to keep up policies of insurance the direction must be taken to be for the benefit of all parties who, in the result, prove to be interested, and the outgoings must be borne accordingly. *Seymour v. Vernon*, 19 L. T. 58.

(*l*) *Gresley v. Adderley*, 1 Sw. 579; *Salt v. Lord Donegal*, 1 L. & G. temp. Sug. 91; *Penney v.*

Todd, 26 W. R. 502; W. N. 1878, 71. *Comp. Piddock v. Boulton*, 16 L. T. 837. A person who is not a party to an action is not entitled to apply by motion for payment of money to him by a receiver appointed in the action, even though his claim is made in respect of a debt properly payable out of the funds in the receiver's hands, *Brocklebank v. East London Railway Co.*, 12 Ch. D. 839.

(*m*) *Gresley v. Adderley*, 1 Sw. 579; *Thomas v. Brigstocke*, 4 Russ. 64; *Flight v. Camac*, 4 W. R. 664.

the mortgaged property is appointed without prejudice to the rights of the first mortgagee, and the first mortgagee afterwards serves the parties to the action with a notice of motion to discharge the receiver or to be let into possession, the first mortgagee is to be treated as having been, from the date of the service of his notice of motion, in possession of the mortgaged property, and is therefore entitled to any back rents paid after that date to the receiver (*n*).

A debenture holder who has brought an action to enforce his security, and has obtained the appointment of a receiver, is not thereby precluded from presenting a petition to wind up the company (*o*).

An order appointing a receiver at the instance of a judgment creditor does not create a charge on the debtor's personal property, in favour of the creditor at whose instance the receiver is appointed (*p*). And, that being so, a person who has obtained such an order cannot, merely by giving notice of it, make it a charge (*q*). The court has, therefore, no jurisdiction to make a declaration of charge over personal property over which it is appointing a receiver (*q*).

But although the order does not create a charge, it operates as an injunction to restrain the debtor from himself receiving moneys over which the order extends (*r*),

(*n*) *Preston v. Tunbridge Wells Opera House* [1903], 2 Ch. 323, 325; and see *Re Metropolitan Amalgamated Estates*, W. N. 1912, 219, *ante*, p. 179.

(*o*) *Re Borough of Portsmouth Tramways Co.* [1892], 2 Ch. 362.

(*p*) *Re Potts* [1893], 1 Q. B. 648; *Re Beaumont*, W. N. 1910,

181; 79 L. J. Ch. 744.

(*q*) See *per* Farwell, J., in *Ridout v. Fowler* [1904], 1 Ch. 662, 663. This case was affirmed by C. A. [1904], 2 Ch. 94.

(*r*) *Flegg v. Prentis* [1892], 2 Ch. 428; see *de Peyrecave v. Nicholson*, 42 W. R. 702; *Westhead v. Riley*, 25 Ch. D. 413.

Chap. VI. and to restrain him from dealing with the moneys to the prejudice of the judgment creditor (*s*).

If the receivership order does not contain a direction for payment to the judgment creditor, the receiver holds the property, when it reaches his hands, *in medio*, and it remains subject to all claims which are paramount to that of the judgment creditor at the date when the order is obtained; but, subject to these claims, the court will order the receiver to pay the judgment creditor the amount of his debt in priority to the claims of any persons whose interests in the fund are acquired subsequently to the date of the order, except those of persons whose claims may have priority by statute, *e.g.*, a trustee in bankruptcy (*t*). Thus, where a judgment creditor had obtained the appointment of a receiver over certain copper, which was subject to a lien, and the debtors were subsequently adjudicated to be in judicial liquidation in France, it was held that the judgment creditor was entitled to the copper after the lien had been satisfied, in priority to the liquidator, though nothing had been received at the date of the liquidation (*u*).

(*s*) *Per* Lindley, L.J., in *Tyrrel v. Painton* [1895], 1 Q. B. 206; *per* Farwell, J., in *Ridout v. Fowler* [1904], 1 Ch. 663, 664.

(*t*) See *per* Eady, J., in *Re Marquis of Anglesey* [1903], 2 Ch. pp. 731, 732; *per* Kekewich, J., in *Ideal Bedding Co. v. Holland* [1907], 2 Ch. 170; *Ex parte Peak Hill Goldfield, Ltd.* [1909], 1 K. B. p. 437.

(*u*) *Levasseur v. Mason and Barry* [1891], 2 Q. B. 73. The case of *Ridout v. Fowler* [1904],

2 Ch. 93, cited *supra* (claim by judgment creditor of purchaser in respect of forfeited deposit), was decided against the creditor on the ground that the forfeiture of the deposit by the vendor was under the contract by virtue of the purchaser's default, which was prior in date to the receivership order; and that certain money paid by the vendor, was to secure possession of the land, not in part repayment of the deposit.

Further, although a receivership order obtained by a judgment creditor does not create a charge on personal property over which the receiver is appointed, it prevents any subsequent mortgagee or judgment creditor from gaining priority, by means of a stop order or a charging order, over the creditor obtaining the receivership order, if, at the date when the last-mentioned order is obtained, the property of the judgment debtor cannot be taken in execution or made available by any other legal process (*x*); the mere omission to obtain a stop order does not postpone a judgment creditor who has obtained a receivership order to a person who subsequently obtains a stop order (*y*). But an assignee for value of a debt has priority over a judgment creditor who obtains a receivership order, although the order is made before notice of the assignment has been given (*z*).

Inasmuch as a receivership order operates to prevent the judgment debtor from dealing with the property comprised in it, he cannot utilise such property for purposes of a cross-claim or by way of set-off against a third person. Thus, where the property consists of debentures of a company which have become due, the judgment debtor cannot set them up to defeat a bankruptcy

(*x*) See *per* Swinfen Eady, J., in *Re Marquis of Anglesey* [1903], 2 Ch. 727, at p. 731. In that case the receivership order was obtained over a judgment debtor's interest in residuary personal estate, partly in court and partly in the hands of an executor to whom notice of the order was at once given, and, at the date of the order, the residue was unascertained, and the fund

in court was insufficient for the payment of the testator's creditors, and therefore the judgment creditor obtaining the order did not obtain either a charging order or a stop order.

(*y*) See *Re Galland*, W. N. 1886, 96; *Fahey v. Tobin* [1901], 1 Ir. R. p. 516.

(*z*) *Re Bristow* [1906], 2 Ir. R. 215.

Chap. VI. petition by the company, founded on a debt less in amount than the sum secured by the debentures (a).

A receiver appointed at the instance of a creditor holds the goods of the debtor as agent for the court, not for the creditor. He holds them for the court, in order that it may decide the right to them. Moreover, an order appointing a receiver of the goods of a debtor does not amount to a delivery in execution of the goods in favour of the creditor at whose instance he was appointed, nor make a judgment creditor who has obtained such an order a secured creditor within the meaning of ss. 9 and 168 of the Bankruptcy Act, 1883 (b). Nor does it create any charge, so as to give the creditor priority over other creditors, where the judgment debtor is a company in liquidation (c). It is not execution, so as to entitle the executors of a deceased judgment creditor to apply for it under R. S. C. Ord. XLII. r. 23, in order to enforce a judgment obtained by their testator (d). Nor does it amount to a stay of execution within section 4, 1 (g) of the Bankruptcy Act, 1883, so as to disentitle the judgment creditor obtaining the order to issue a bankruptcy notice in respect of the same debt (e).

The effect of the appointment of a receiver by way of equitable execution over interests in land is somewhat

Effect of
appoint-
ment of
receiver

(a) *Re a Debtor, Ex parte Peak Hill Goldfield, Ltd.* [1909], 1 K. B. 430, 437.

(b) *Re Dickinson, Ex parte Charrington*, 22 Q. B. D. 187; *Re Potts, Ex parte Taylor* [1893], 1 Q. B. 648; *Re O'Neill*, 21 L. R. Ir. 211.

(c) *Croshaw v. Lyndhurst Ship Co.* [1897], 2 Ch. 154; *Re Lough Neagh Ship Co.* [1896], 1 Ir. R.

29.

(d) *Norburn v. Norburn* [1894], 1 Q. B. 448; see p. 61, *ante*.

(e) *Re Bond, Ex parte Capital and Counties Bank* [1911], 2 K. B. 988; nothing had in fact come into the hands of the receiver; the court in bankruptcy may inquire whether the receivership order prevented payment of the debt (ib.).

different; for it is equivalent to execution under a writ of *elegit* in respect of legal interests, and therefore is a delivery in execution within the meaning of section 1 of the Judgments Act, 1864 (27 & 28 Vict. c. 112), thus making the judgment creditor a secured creditor within the meaning of section 168 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52) (*f*).

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over
interests
in land.

It is to be borne in mind that unless a writ of *elegit* or order appointing a receiver of an interest in land by way of equitable execution is duly registered pursuant to section 5 of the Land Charges Registration and Searches Act, 1888 (51 & 52 Vict. c. 51) (*g*), the writ or order and every delivery in execution or other proceeding taken in pursuance of it, is void as against a purchaser for value of the land (*h*). Subject to that, a judgment creditor who has got a receiver appointed may apply by originating summons for an order for sale of his debtor's interest in any land delivered in execution (*i*), unless the property over which the receiver has been appointed is a reversionary interest which cannot be actually delivered in execution (*k*).

Inasmuch as a receivership order obtained by a judgment creditor makes him a secured creditor as

(*f*) *Ex parte Evans*, 13 Ch. D. 252; and see *Blackman v. Fysh* [1892], 3 Ch. 209, as to a receivership order amounting to a process of execution within the meaning of limitation in a will.

(*g*) And see Land Charges Act, 1900 (63 & 64 Vict. c. 26).

(*h*) See section 6 of the above Act, an enactment which abrogated the effect of the decision

in *Re Pope*, 17 Q. B. D. 743. By section 4 "purchaser for value" is defined to include a mortgagee lessee or other person who for valuable consideration takes an interest in land or a charge on land."

(*i*) R. S. C. Ord. LV. r. 9B; *Re Jones and Judgments Act*, 1864, W. N. 1895, 123.

(*k*) *Re Harrison and Bottomley* [1899], 1 Ch. 465.

Chap. VI. regards the land, he is entitled to be added as defendant in a foreclosure action. He must, however, take the action as he finds it; a time fixed for foreclosure will not in an ordinary case be extended (l).

Incumbrancers may or may not avail themselves of an order appointing a receiver by applying to him. If they apply to him, they will be paid their interest, or, if he refuses or neglects to pay them, they may complain to the court of such neglect or refusal; but if they omit to apply for the interest, it is to be presumed that they are satisfied with the security they have both for interest and also for principal. The court does not enforce payment upon them, nor does it set apart any portion of any rents and profits receivable by the receiver to answer unclaimed interest. The balance is paid in by him, and is carried to the credit of the action without any previous inquiry whether all incumbrancers have or have not been paid their interest (m). A direction given by the court to the receiver, to keep down the interest on incumbrances, has not the effect of an appropriation of any rents and profits receivable by him to that specific purpose. It is given, in the case of a receivership of a testator's estate, without the least view to the interests of his real or personal representatives. It is given partly in justice to the incumbrancers, that they may not be injured by the act of the court in taking possession of rents and profits to which they had a right to resort for payment of their interest, and partly for the benefit of the estate itself, lest the incumbrancers, having

(l) *Re Parbola, Ltd.* [1909], 2 W. R. 502; W. N. 1878, 71. Ch. 437. Comp. *Piddock v. Boulthbee*, 16

(m) *Bertie v. Lord Abingdon*, L. T. 837.
3 Mer. 567; *Penny v. Todd*, 26

their interest stopped, might be induced to resort to proceedings injurious to those who stand behind them⁽ⁿ⁾. Chap. VI.

In a case in which the testator, after devising lands to his son for life, had declared that, in case the property so devised should "be taken in execution by any process of law for the benefit of any creditor," the devise should immediately become void, and a judgment creditor of the son (who was in possession) obtained an order appointing a receiver of the rents, it was held that the appointment was a taking in execution, and operated to determine the son's life estate^(o); but the mere appointment of a receiver over a life interest in residuary estate, where nothing has been done under the order, was held not to cause the life interest to belong to or become vested in any other person so as to cause a forfeiture^(p). But where a testator's son-in-law was entitled to a share of the income of the residuary estate during his life or until he should charge the share or any part of it, and, a receiver having been appointed in an action for the administration of the estate, the son-in-law, in November, 1902, wrote to the receiver, telling him that he owed a sum of 5*l.* payable in the following January, and asking him to "deduct this sum from any moneys that may be found due to me on the passing of your accounts by the Court of Chancery on that date," and to pay it to the creditor, it was held by the Court of Appeal that, inasmuch as at the date of the letter the receiver had in his hands on account of income a sum of more Forfeiture.

⁽ⁿ⁾ *Bertie v. Lord Abingdon*, 3 Mer. 567; see, too, *Flight v. Camac*, 4 W. R. 664. Comp. *Piddock v. Boulton*, 16 L. T. 837.

^(o) *Blackman v. Fysh* [1892], 3 Ch. 209.

^(p) *Re Beaumont*, 79 L. J. Ch. 744; W. N. 1910, 181.

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than 5*l.* to which the son-in-law was entitled, the latter had not incurred a forfeiture. The letter might reasonably be construed as referring to the money actually in the hands of the receiver; and the receivership order did not make that a forfeiture which would not have been a forfeiture if the order had not been made (*q*).

Receiver
considered
as agent
of party
entitled.

When the party entitled to an estate over which a receiver has been appointed has been ascertained, the receiver will in some cases be considered as his receiver (*r*). Accordingly, where a receiver was appointed in a suit for specific performance at the instance of a vendor, and the purchaser was compelled to accept the title, it was held that the receiver must be considered as his receiver (*s*). In a case, however, where a receiver had been appointed in consequence of the inability of the vendor of an estate, sold under a decree, to make out his title, the court was of opinion that the expenses of a receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of a fund in court, together with the costs to the application (*t*).

Loss
arising
from
default of
receiver
must be
borne by
the estate.

Inasmuch as a receiver appointed by the court is appointed on behalf and for the benefit of all persons interested, being parties to the action (*u*), if a loss arises from the default of a receiver so appointed, the estate must bear it as between the parties to the action (*r*).

(*q*) *Durran v. Durran*, W. N. 1904, 184; 91 L. T. 187.

(*r*) *Boehm v. Wood*, T. & R. 345; *Re Butler*, 13 Ir. Ch. 456; *Rigge v. Bowater*, 3 Bro. C. C. 365.

(*s*) *Boehm v. Wood*, T. & R. 345; see, too, *Re Butler*, 13 Ir. Ch. 456.

(*t*) *McCleod v. Phelps*, 2 Jur. 962.

(*u*) *Davis v. Duke of Marlborough*, 2 Sw. 118; *Bertrand v. Davies*, 31 Beav. 436; *Frazier v. Burgess*, 13 Moo. P. C. 314; *Defries v. Creed*, 34 L. J. Ch. 607.

(*v*) *Hutchinson v. Massareene*,

The rents and profits of an estate over which a receiver has been appointed are, as far as regards parties to the action, bound from the date of the order for the appointment (*w*). But the appointment never relates back to the date of the application (*x*). Still, if a solicitor in the action has received rents without the authority of the court, he must pay them over to the receiver appointed therein, although he may not have been actually clothed with the character of receiver at the time when the rents were received. The solicitor cannot be permitted to set up a lien on them for his costs (*y*). Chap. VI.
Rents, &c.

If the tenant for life of a mortgaged estate, with power to lease, exercises the power pending a foreclosure action and after the appointment of a receiver, the lessees are considered, as against prior incumbrancers, as tenants from year to year to the receiver (*z*).

An order on tenants to pay their rents to a receiver appointed by the court attaches all rents in their hands unpaid at the time of service of the order. In respect of rents which have been paid by the tenants prior to such service, they are not answerable.

If, after a receiver has been appointed, assets are collected by him, an executor has no right of retainer out of those assets. But the right of an executor to retainer out of legal assets which have actually come into his hands before the appointment of a receiver is

2 Ba. & Be. 55; and see *Re* p. 339.

London United Breweries [1907], (*y*) *Wickens v. Townsend*, 1 R. & M. 361; see, too, *Re Birt*,

2 Ch. 511, and p. 315, *post*. 22 Ch. D. 604; *Re British Tea*

(*w*) *Lloyd v. Mason*, 2 M. & C. 487; *Codrington v. Johnstone*, 1 *Table Co.*, 101 L. T. 707.

Beav. 520. (*z*) *Lord Mansfield v. Hamilton*, 2 Sch. & Lef. 28.

(*x*) *Per Lindley, M.R.*, in *Re Clarke* [1898], 1 Ch. at

Chap. VI. unaffected by the appointment (a), even though he may have paid over those assets to the receiver (b).

Interference with the possession of a receiver.

When the court has appointed a receiver and the receiver is in possession, his possession is the possession of the court, and may not be disturbed without its leave (c). If anyone, whoever he be, disturb the possession of the receiver, the court holds that person guilty of a contempt of court, and liable to be imprisoned for the contempt (d). The court will not allow the possession of its receiver to be interfered with or disturbed by anyone, whether claiming by a title paramount to or under the right which the receiver was appointed to protect (e). But unless the receiver comes with clean hands he will not be granted an injunction to restrain any interference with him, for instance, by distress (f). A man who

(a) *Re Jones*, 31 Ch. D. 440.

(b) *Re Harrison*, 32 Ch. D. 395.

(c) *Angel v. Smith*, 9 Ves. 335; *Aston v. Heron*, 2 M. & K. 391; *Ames v. Birkenhead Docks*, 20 Beav. 353; *Defries v. Creed*, 34 L. J. Ch. 607. As to cases where a receiver has been appointed by a mortgagee under powers contained in a deed or under the Conveyancing Act, 1881, see *Bayly v. Went*, W. N. 1884, 197; 51 L. T. 765, and Chapter XIV.

(d) *Fripp v. Bridgewater, &c. Railway Co.*, 3 W. R. 356; *Lane v. Sterne*, 3 Giff. 629; *Ex parte Hayward*, W. N. 1881, 115. See, too, *Dixon v. Dixon* [1904], 1 Ch. 161, where an injunction restraining interference with a

receiver and manager was applied for and granted. A libel on a business carried on by a receiver and manager appointed by the court is a contempt of court, and may be punished by the committal of the offender. *Helmores v. Smith*, 35 Ch. D. 449. As to form of order for committal for obstructing a receiver, see Seton, 7th ed. p. 454.

(e) *Evelyn v. Lewis*, 3 Ha. 475; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 114.

(f) *Jarvis v. Islington Borough Council*, 73 J. P. N. C. 323, where the court refused to restrain a distress to recover a fine levied on a company (over the assets of which a receiver had been appointed) for selling

thinks he has a right paramount to that of the receiver must, before he presumes to take any step of his own motion, apply to the court for leave to assert his right against the receiver (*g*). If the receiver has done anything wrong, the party who has suffered the wrong must apply to the court which appointed the receiver, and he will get full justice done (*h*). In a case in which an action in the King's Bench Division was threatened by the owner of certain plant against a receiver appointed in a debenture holder's action, to enforce a claim in respect of the user by the receiver of such plant, the court, upon motion in the debenture holder's action, restrained any proceedings otherwise than by way of claim therein (*i*). And a receiver appointed to get in property, part of which he finds in the possession of another receiver, ought not to take proceedings to deprive the latter of such possession without the authority of the court. He, or the parties at whose instance he was appointed, should ask for the direction of the court as to how he ought to proceed (*k*).

It is immaterial that the order appointing a receiver may have been improper or erroneous. It is not competent for anyone to interfere with the possession of a receiver

adulterated milk, where the offence had been committed by the receiver himself.

(*g*) *Ib.*; *Hawkins v. Gathercole*, 1 Drew. 17; *Randfield v. Randfield*, 1 Dr. & Sm. 314; *Ex parte Cochrane*, L. R. 20 Eq. 282, and cases cited in note (*e*), *supra*.

(*h*) *Ex parte Day*, 48 L. T. 912.

(*i*) *Re Maidstone Palace of Varieties* [1909], 2 Ch. 283. A

county court judge has no jurisdiction to order payment by a receiver out of assets of compensation due under the Workmen's Compensation Act, 1906: the application must be made to the court administering those assets: *Homer v. Gough* [1912], 2 K. B. 303.

(*k*) *Ward v. Swift*, 6 Ha. 312; *Ex parte Cochrane*, L. R. 20 Eq. 282.

Chap. VI. on the ground that the order appointing him ought not to have been made. It is enough that it is a subsisting order. Persons who feel aggrieved by an order of the court may take a proper course to question its validity, but while it lasts it must be obeyed (*l*).

The court requires and insists that application be made to it for permission to take possession of any property of which its receiver has taken, or is directed to take, possession. The rule is not confined to property actually in the hands of a receiver; for the court will not permit anyone, without its sanction and authority, to intercept or prevent payment to the receiver of any property within the territorial jurisdiction of the court which he has been appointed to receive, although it may not be actually in his hands (*m*). Where, however, the court appoints a receiver over property out of the jurisdiction, the receiver is not put in possession of such foreign property by the mere order of the court (*n*). Something further has to be done, and, until that has been done in accordance with the foreign law, any person, not a party to the action, who takes proceedings in the foreign country for the purpose of establishing a claim upon the foreign property, is not guilty of a contempt of court on the ground of interference with the receiver's possession or otherwise. And, in reference to such proceedings, no distinction can be drawn between a foreigner and a British subject (*o*). The possession of a receiver appointed over an estate is not affected by notice given by a mortgagee, who alleges that his title is prior to that

(*l*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117.

(*m*) *Ames v. Birkenhead Docks*, 20 Beav. 353.

(*n*) See *Re Huinac Copper Mines*, W. N. 1910, 218.

(*o*) *Re Maudslay, Sons, & Field* [1900], 1 Ch. 602, at p. 611.

under which the receiver claims, to the tenants to pay their rents to him (*p*). Chap. VI.

An action cannot be brought against a receiver by a person at whose instance he has been appointed (*q*). A person who is prejudiced by the conduct of a receiver appointed in an action ought not, without the leave of the court, to commence a fresh action to restrain the proceedings of the receiver, even though the act complained of was beyond the scope of the receiver's authority. His proper course, in such a case, is to make an application for such relief as he is entitled to in the action in which the receiver was appointed (*r*). Where a receiver has been appointed by a court having jurisdiction in bankruptcy, the person at whose instance he was appointed must make any complaint which he may have against him to the court which made the appointment, and not otherwise (*s*). In a case in which, at the time when a receiver was appointed, by way of equitable execution, by a judge of the High Court on the application of a judgment creditor, the debtor's property was legally, though not actually, in the possession of a receiver appointed by a County Court having jurisdiction in bankruptcy, the equitable execution obtained by the judgment creditor was held to be ineffectual (*t*).

(*p*) *Thomas v. Brigstocke*, 4 Russ. 64. See also *Re Metropolitan Amalgamated Estates Co.*, W. N. 1912, 219.

(*q*) *Ex parte Day*, 48 L. T. 912; W. N. 1883, 118.

(*r*) *Searle v. Choat*, 25 Ch. D. 723; and *ante*, p. 193.

(*s*) See *Ex parte Cochrane*, L. R. 20 Eq. 282; *Ex parte Day*, 48 L. T. 912; W. N. 1883, 118.

Note that by the Bankruptcy Act, 1883, ss. 92, 94, and orders made under that Act, the London Court of Bankruptcy has become part of the Supreme Court, and its jurisdiction has been transferred to the King's Bench Division of the High Court and the County Courts having jurisdiction in bankruptcy.

(*t*) *Salt v. Cooper*, 16 Ch. D. 544.

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A receiver appointed by the court cannot, on the ground that his appointment has been improper, be compelled to interplead; but he may, if summoned, appear for the purpose of asserting his right, and denying the right of any court other than that which appointed him to interfere with his possession (*u*).

If a receiver improperly pays money in his hands contrary to the order of the court which appointed him, the person to whom it has been paid will be ordered to repay it, and the receiver may be liable to pay the costs of the motion for that purpose. The court never allows any person to interfere without its leave with money or property in the hands of its receiver, whether it is done by the consent or submission of the receiver, or by compulsory process against him. All moneys which come to the hands of a receiver by virtue of an order of the court enabling him to receive, and entitling him to give a good discharge to the persons paying, them, are moneys belonging in a sense to the court, and the receiver can discharge himself only by paying them in obedience to the direction and order of the court. A judgment creditor cannot, without leave, attach under a garnishee order moneys in the hands of a receiver which have been directed to be paid by him to the judgment debtor (*y*). It is not necessary to wait for the passing of a receiver's accounts before applying to the court to prevent him from misapplying moneys in his hands (*z*).

What constitutes disturbance of a receiver.

Any deliberate act, calculated to destroy property under the management of the court by means of a receiver and manager, is an interference with that

(*u*) See *Russell v. East Anglian &c., of Brecon*, 28 Beav. 200, *Railway Co.*, 3 Mac. & G. 115, 203; and R. S. C. Ord. XLV. 122, 123.

(*z*) *De Winton v. Mayor, of Brecon*, 28 Beav. 200, 203.

receiver, although it may not induce the breaking of any contract. The object of the court is to prevent any undue interference with the administration of justice, and when anyone, whether a partner in a business, a party to the litigation, or a stranger, interferes with an officer of the court, it is essential for the court to protect that officer. Tampering with employees, and inducing them to leave a business that is being carried on under the direction of the court with the view of taking employment in a business that is being started in opposition, is an interference against which the receiver and manager is entitled to protection, and may be restrained by injunction (*a*).

The rule, however, that the possession of a receiver may not be disturbed without leave, does not apply, so far at least as third persons are concerned, until a receiver has been actually appointed, and is in actual possession. It is not enough that an order has been made directing the appointment of a receiver. Until the appointment has been perfected, and the receiver is actually in possession, a creditor is not debarred from proceeding to execution. The order appointing a receiver is for the benefit of the parties to the action. It does not affect third persons until the appointment is completed and perfected (*b*). An execution creditor may, therefore, seize chattels after an order has been made appointing a receiver on his giving security, but before the security has been given or possession taken (*c*).

Nor is there disturbance of a receiver unless the order

(*a*) *Per* Swinfen Eady, J., in *Ch.* 607; *Edwards v. Edwards*, *Dixon v. Dixon* [1904], 1 *Ch.* 2 *Ch. D.* 291.
 161, at p. 163, and see p. 192. (*c*) *Ex parte Evans*, 13 *Ch. D.*
 (*b*) *Defries v. Creed*, 34 *L. J.* 255, *per* James, L.J.

Chap. VI. for the appointment of a receiver states distinctly, on the face of it, over what property the receiver is appointed, so as to make known what the property is of which he is in possession (*d*). Hence, where a receiver was appointed "of the income of the outstanding trust property in the pleadings mentioned," and the receiver entered into and remained for several years in possession of certain real estates constituting that property, and the tenants attorned to him, an application to restrain the legal owner from proceeding against the tenants without the leave of the court was refused with costs. The appointment should have been expressed to be over the rents of the particular property, and should have been followed by a direction to the owner to deliver possession, or that the tenants should attorn (*e*).

Nor, again, was there disturbance of a receiver in a case where, the chairman of a railway company having been appointed receiver, a debenture holder, who had recovered judgment against the company in respect of arrears of interest, applied, under section 36 of the Companies Clauses Consolidation Act, 1845, for leave to issue execution against the chairman of the company to the extent of the money remaining due in respect of his shares; the money which would be reached by the execution in such a case being money in the hands of an individual shareholder, and not part of the undertaking or profits of the company, of which alone he had been appointed receiver (*f*).

To constitute disturbance of a receiver, it is not necessary that the person complained of should be

(*d*) *Crow v. Wood*, 13 Beav. 271.

(*e*) *Crow v. Wood*, 13 Beav. 271; *supra*, p. 11.

(*f*) *Re West Lancashire Rail-*

way Co., W. N. 1890, 165; 63 L. T. 56.

about to turn the receiver out of possession. The court will not allow the first step to be taken by anyone in an action of ejectment against a receiver, without an application having been first made to the court for permission to take it (*g*). So, a local authority cannot, without the leave of the court, distrain upon property in the hands of a receiver for money due to it (*h*); and guardians of the poor may be restrained from levying distress upon property of a lunatic in the hands of a receiver (*i*).

Where a receiver has been appointed without prejudice to the rights of any prior incumbrancer, and a prior incumbrancer has taken possession, he may enforce his rights, whatever they may be, without being guilty of a contempt of court. And so where, after the appointment of a receiver without prejudice to the rights of prior incumbrancers, a prior incumbrancer is in possession, a tenant of the premises, who has under threats of eviction made a payment to the prior incumbrancer to which he was entitled, is not guilty of disobedience to the receivership order, and the tenant, having made the payment under compulsion of law, can set it up in answer to a claim by the receiver (*k*).

In *Kewney v. Attrill* (*l*), after a receiver had been appointed in a Chancery action for dissolution of a partnership, creditors of the firm recovered judgment against it in the Queen's Bench Division for their debt and costs; and, on an application in the Chancery action

(*g*) *Hawkins v. Gathercole*, 1 Drew. 18.

(*i*) *Winkle v. Bailey* [1897], 1 Ch. 123.

(*h*) See *Pegge v. Neath District Tramways Co.* [1895], 2 Ch.

(*k*) *Underhay v. Read*, 20 Q. B. D. 209.

508; *Reeve v. Medway Upper Navigation Co.*, 21 T. L. R. 400.

(*l*) 34 Ch. D. 345.

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by the judgment creditors, an order was made giving them a charge for their debt, with interest, and costs, against all moneys of the partnership come or coming to the hands of the receiver, the creditors undertaking to deal with the charge according to the order of the court; the intention of the court being to preserve to the creditors all the rights they would have had if they had issued execution, and the sheriff had seized and sold the assets, on the day on which the application was made. This form of order, however, which is a substitute for leave to issue execution notwithstanding the possession of a receiver (*m*), does not, it is conceived, operate to give any charge except as among the creditors of the partnership themselves, or as against the several partners in the firm. It does not, for instance, override the right of the solicitor of the plaintiff in the partnership action to a charge for his costs under section 28 of the Solicitors Act, 1860 (23 & 24 Vict. c. 127) (*n*).

Persons
claiming
under a
right
paramount
to the
receiver
must apply
to the
court.

If, at the time when a receiver is appointed, a person claiming a right in the same subject-matter is in possession of the right which he claims, the appointment of the receiver leaves him in possession of the right, and does not interfere with the exercise of it (*o*). If, on the other hand, the claimant was at that time out of possession, he must apply to the court before he institutes any legal proceedings affecting the possession which the receiver has acquired (*p*). The rule applies even to cases where the receiver has been appointed

(*m*) See *e.g.*, *Brand v. Sand-ground*, 85 L. T. 517. 472; *Wells v. Kilpin*, L. R. 18 Eq. 298; *Underhay v. Read*, 20

(*n*) *Ridd v. Thorne* [1902], 2 Q. B. D. 209. Ch. 344, at p. 348.

(*p*) *Evelyn v. Lewis*, 3 Ha. 475.

without prejudice to the right of persons having prior charges (*q*); and to cases where a receiver has been appointed over the estate of a tenant in possession. The appointment of a receiver as against the estate of a tenant does not affect the rights of the landlord, but he will not be permitted to exercise those rights without first obtaining the leave of the court. Before distraining he should come to the court and ask for authority to distrain, notwithstanding the appointment of a receiver (*r*).

So, again, where, after a mortgagee of leasehold land has obtained the appointment by the court of a receiver, the lessor brings an action against the lessee and obtains judgment for recovery of the land, he (the lessor) cannot proceed to enforce the judgment, as against the receiver, by writ of possession, without first getting the leave of the court to do so (*s*).

Persons whose rights are interfered with by having a receiver put in their way may, on making a proper application to the court, obtain all that they can justly require (*t*). The court has the power, and will always take care, to give to a party, who applies in a regular

(*q*) *Bryan v. Cormick*, 1 Cox, 422; see, too, *Langton v. Langton*, 7 D. M. & G. 30.

(*r*) *Sutton v. Rees*, 9 Jur. N.S. 456; see, too, *Walsh v. Walsh*, 1 Ir. Eq. 209. Where, however, a receiver is placed over the estate of an inheritor, or superior landlord, and the lands are occupied by under-tenants, the intermediate tenant may distrain upon the occupiers for rent, without any order for the purpose: *Furlong on Land*, and

Ten. 744. Where a receiver of leaseholds is appointed, and the landlord gives him notice of a claim for rent, but takes no other step, and the receiver sells the furniture, the landlord has no priority over other creditors in respect of the proceeds of the sale: *Sutton v. Rees*, 9 Jur. N.S. 456.

(*s*) *Morris v. Baker*, 73 L. J. Ch. 143.

(*t*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117.

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manner for the protection of his rights, the means of obtaining justice, and will even assist him in asserting his rights and having the benefit of them (*u*). Thus, where a receiver has been appointed in a partnership action, a creditor who is in a position to levy execution against the assets of the firm may apply to the court for leave to do so, notwithstanding the appointment of a receiver, and thereupon either leave will be given, or an order will be made directing the receiver to pay, so as to avoid a sale by the sheriff (*x*).

The proper course for a person to adopt who claims a right paramount to that of the receiver, or rather to that of the party who obtained the receiver, and is prejudiced by having the receiver put in his way, is to apply to the court for leave to proceed, notwithstanding the possession of the receiver, or to come in and be examined *pro interesse suo* (*y*). The application may

(*u*) *Evelyn v. Lewis*, 3 Ha. 475; *Hawkins v. Gathercole*, 1 Drew. 17; *Ex parte Cochrane*, 20 Eq. 282; *Forster v. Manchester and Milford Railway Co.*, 49 L. J. Ch. 454; W. N. 1880, 63; and see *Re Septimus Parsonage Co.*, 17 T. L. R. 420, where possession was given to trustees for debenture holders, though an action was pending by first debenture holders in which the appointment of a receiver was claimed.

(*x*) *Mitchell v. Weise*, W. N. 1892, 139.

(*y*) *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greated*, 1 J.

& W. 178; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 117; *Ex parte Cochrane*, L. R. 20 Eq. 282. In a case where a receiver had been appointed in a suit instituted by incumbrancers, it was held that a judgment creditor might file a bill against the owner and the receiver to have his debt paid out of the surplus; and that the incumbrancers in the former suit need not be made parties to the latter: *Lewis v. Lord Zouche*, 2 Sim. 388. So, in a case where a receiver had been appointed at the suit of certain incumbrancers, to which suit the first

be made by motion, or on summons (*z*) with notice (*a*), and is usually framed in the alternative, that the receiver may pay the amount of the claimant's demand, or that the latter may be allowed to proceed (*b*). The application must be made in the action in which the receiver was appointed, and not in a fresh action against the person who obtained his appointment (*c*).

It was held in an Irish case that a party who had, without the leave of the court, instituted proceedings at law to recover lands in the possession of a receiver, could not come to the court for leave to continue his proceedings (*d*). If, however, a special case is made out, the court may allow a party to continue an action, notwithstanding that it was commenced after the appointment of a receiver, and that the leave of the court was

incumbrancer was not a party, it was held that a bill would lie by him against the receiver and the several parties to the earlier suit, for the purpose of establishing his priority: *Smith v. Lord Effingham*, 2 Beav. 232. In a later stage of the last-mentioned case (7 Beav. 374), it was said by Lord Langdale, that a receiver was not a necessary party to a bill by a first incumbrancer to establish his right, and that there was reason to doubt whether he was even a proper party. It is irregular to apply for an injunction to restrain a receiver from paying money to other incumbrancers (2 Beav. 232), or to restrain a person from receiving money from a receiver. *Ib.* 507.

(*z*) *Richards v. Richards*, John. 255; comp. *O'Hagan v. North Wingfield Colliery Co.*, 26 Sol. J. 671.

(*a*) As to form of notice of motion or summons for examination *pro interesse suo*, see *Dan. Ch. Forms*, 5th ed.

(*b*) *Brooks v. Greathed*, 1 J. & W. 178; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125.

(*c*) *Searle v. Choat*, 25 Ch. D. 723; see, too, *Ames v. Richards*, 40 L. J. Notes of Cases, p. 66, where the application (which failed) was made by motion.

(*d*) *Lees v. Waring*, 1 Hog. 216; comp. *Townsend v. Somerville*, *ib.* 100.

Chap. VI. not in the first instance applied for in reference to the commencement (*e*). In one case, where ejectment was brought against a receiver without the previous leave of the court, the court nevertheless directed an inquiry whether it would be for the benefit of the parties interested, who were adults, that the receiver should defend the ejectment, and charge the expenses in his accounts (*f*).

The court refused to restrain a person from prosecuting an action in a Scottish court, which amounted to interference with a receiver (although it had jurisdiction to do so), where the receiver had been added as a defendant in the Scottish action and his rights and those of the plaintiff could most conveniently be determined in that action (*g*).

Where a person has brought an action against a receiver, or has otherwise interfered with his possession, without the leave of the court, the order restraining the irregular act may also give leave, or direct, that the author of it be examined *pro interesse suo* (*h*).

The inquiry as to interest is conducted in the same manner as that in which it would be conducted if the property were in the possession of sequestrators under a commission of sequestration (*i*). If the court, on examining the title, is satisfied that the right of the claimant is clear, it will at once decide the matter in his favour, without directing an inquiry, and order the receiver to pay him what he claims (*k*), or give the claimant leave to

(*e*) *Gowar v. Bennett*, 9 L. T. 310; see, too, *Aston v. Heron*, 2 M. & K. 397.

(*f*) *Anon.*, 6 Ves. 287.

(*g*) *Re Derwent Rolling Mills*,

21 T. L. R. 81, 701.

(*h*) See *Johnes v. Cloughton*, Jac. 573.

(*i*) Dan. Ch. Pr. 921, 1696.

(*k*) *Dixon v. Smith*, 1 Sw. 457;

enforce his legal remedy, notwithstanding the possession of the receiver (*l*). Thus, leave was given by the Court of Chancery to a judgment creditor, on his application, to sue out an *elegit* against property in the possession of a receiver (*m*). So, also, where a person wishes to distrain on property in the possession of a receiver, the court, on being satisfied that the legal right of distress is paramount to the title of the party for whose benefit the receiver was appointed, will allow the distress to be made, either for rent (*n*) or for rates or other money due to a local authority (*o*), or for money due to a gas company, for which it has obtained a distress warrant under its statutory power (*p*). Leave will be given to distrain, notwithstanding the possession of a receiver,

Russell v. East Anglian Railway Co., 3 Mac. & G. 118; *Randfield v. Randfield*, 1 Dr. & Sm. 314, *per* Kindersley, V.-C.; see, too *Ex parte Thurgood*, 18 L. T. 18, where damages for injuries sustained by a collision had been recovered against a railway company over which a receiver had been appointed.

(*l*) Where a party, claiming under a title paramount to that under which the receiver is appointed, makes out the title which he alleges, and is permitted to enforce his legal remedy, he will generally be allowed the costs of the application: *Eyton v. Denbigh, &c., Railway Co.*, L. R. 6 Eq. 14, 488; see *Walsh v. Walsh*, 1 Ir. Eq. 209.

(*m*) *Gooch v. Haworth*, 3 Beav.

428; *Potts v. Warwick and Birmingham Canal Co.*, Kay, 142.

(*n*) *Cramer v. Griffith*, 3 Ir. Eq. 232; *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 118; *Sutton v. Rees*, 9 Jur. N. S. 456. The right of a landlord to distrain for rent, after the appointment of a receiver in bankruptcy, is limited by the Bankruptcy Act, 1883, s. 42, as amended by the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 28, to six months' rent. See *Ex parte Cochrane*, L. R. 20 Eq. 282.

(*o*) *Peyge v. Neath District Tramways Co.* [1895], 2 Ch. 508; and see *Winkle v. Bailey* [1897], 1 Ch. 123.

(*p*) *Re Adolphe Crosbie, Ltd.*, 74 J. P. 25.

Chap. VI. for a statutory penalty for breach of a condition in the very constitution of a public company, for instance, neglect by a tramway company to keep rails in repair (*q*); but leave was refused to distrain for a penalty under the Highways Acts for failure to pay instalments to a local authority which by agreement had taken over roads which the company was under a statutory liability to repair (*r*). Accordingly, where a company's goods had been mortgaged for more than their value to debenture holders, who brought an action to enforce their rights and obtained the appointment of a receiver, and afterwards the company was ordered to be wound up, leave was given to the landlord of the house in which the goods were to distrain, notwithstanding the appointment of the receiver, and notwithstanding the winding-up order, on the ground that, for all practical purposes, the goods were not the goods of the company but of the debenture holders, as against whom the landlord was entitled to distrain (*s*). Again, a judgment creditor may obtain a garnishee order, attaching moneys payable to the judgment debtor which are in the hands of a

(*q*) *Pegge v. Neath District Tramways Co.* [1895], 2 Ch. 508; in this case the mortgage did not include the chattels and a receiver ought not to have been appointed over them; see *Reeve v. Medway Upper Navigation Co.*, 21 T. L. R. 400.

(*r*) *Reeve v. Medway Upper Navigation Co.*, 21 T. L. R. 400.

(*s*) *Ex parte Purcell*, 34 Ch. D. 646, 660, 662. See too, *Re Harpur's Cycle Fittings Co.*

[1900], 2 Ch. 731, 734, in which case no receiver had been appointed, but Wright, J., considered that that fact made no difference; and distinguish *Re British Fullers' Earth Co.*, 17 T. L. R. 232, where overseers were held to be not entitled to an order directing the receiver appointed in a debenture holders' action to pay to them the amount of a rate out of moneys in his hands.

receiver (*t*), but only such moneys as are actually in his hands when the order is obtained (*u*). So, where a rent-charge created by a railway company under the Lands Clauses Consolidation Act, 1845, had been reserved to a landowner, the court gave him liberty to distrain, notwithstanding that a receiver of the tolls of the company had been appointed, in a suit instituted by the owner of a similar rent-charge on behalf of himself and all other owners of similar rent-charges who should come in and contribute to the expenses of the suit (*x*). So, also, in a case where it was held that a receiver ought not to have been appointed, leave was given to an execution creditor to levy, notwithstanding the appointment (*y*).

Where a receiver for debenture holders had a debt due to the Crown to avoid distraint it was held that he could not claim to be paid a sum, equal to the amount of the discharged debt, out of money, due from the Crown to the company, which had been assigned to third persons (*z*).

In cases where the court is not satisfied that a receiver ought to have been appointed, the court may, that the execution creditor may not suffer loss by the possession of the receiver, in case it shall appear in proceedings taken by the creditor that his right ought not to have

(*t*) *Re Cowan's Estate*, 14 Ch. 1880, 63.

D. 638.

(*u*) See *Webb v. Stenton*, 11 Q. B. D. 518, criticising some of the dicta in *Re Cowan's Estate*, *supra*.

(*x*) *Eyton v. Denbigh, &c., Railway Co.*, L. R. 6 Eq. 14, 488; 16 W. R. 928; *Forster v. Manchester and Milford Railway Co.*, 49 L. J. Ch. 454; W. N.

(*y*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 125; see *Fowler v. Haynes*, 2 N. R. 156.

(*z*) *Re Ind, Coope & Co.* [1911], 2 Ch. 223; *quare* whether one debt could have been set off against the other before payment.

Chap. VI. been interfered with by that possession, order that the receiver keep within the bailiwick for a certain period sufficient property to answer the demand. Or, in such a case, the court may make an order allowing the creditor to levy, unless the amount of his demand be paid into court to the credit of the action within a week from service of the order, the receiver to be at liberty to pay the amount in, and the money to remain in court subject to further order (a).

If incumbrancers come in for examination *pro interesse suo*, and upon inquiry their claim is made out, they are entitled to have rents and profits received and to be received by the receiver applied in payment of the costs of the application, and then of their incumbrances (b).

If there is a doubtful question relating to land, and it is purely a matter of title, the court will give the claimant leave to bring ejectment, taking care, however, to protect the possession by giving proper directions (c). It is not the course of the court, unless it is perfectly clear that there is no foundation for the claim, to refuse leave to try a right which is claimed against its receiver (d).

In an old case, where a prior incumbrancer had delayed over long in pursuing his remedies, the Court of Chancery refused his application, by petition, that a receiver, who had been appointed at the instance of a second incumbrancer, should apply the rents according to their priorities; but leave was given to bring ejectment. The ground of the decision was that the prior incumbrancer

(a) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 151, 153. (c) *Empringham v. Short*, 3 Ha. 470.

(b) *Walker v. Bell*, 2 Madd. 21; *Tatham v. Parker*, 1 Sm. & G. 506. (d) *Randfield v. Randfield*, 3 D. F. & J. 772; *Lane v. Capsey* [1891], 3 Ch. 411.

had no right to come by petition for relief which he had sought in a suit previously commenced by him, but not proceeded with. No costs were given, however, against the prior incumbrancer (*e*). Chap. VI.

Where a receiver has been appointed over the estate of a tenant for life, the remainderman is entitled, on the death of the tenant for life, to go into possession without making any application to the court (*f*).

Where a receiver has been appointed, and has received rents with the knowledge of the first mortgagee, that mortgagee, upon afterwards taking possession, is entitled only to the rents in the receiver's hands, after deduction of the receiver's remuneration and expenses (*g*).

When money comes into the hands of a receiver appointed in a foreclosure action, and no particular direction has been given for its application, it belongs *primâ facie* to the plaintiff, and he, accordingly, has a *primâ facie* right to receive it, in the event of and upon the dismissal of the action (*h*). An order for payment of money out of court may be made after the dismissal of an action (*i*). To whom money in the hands of a receiver appointed in a foreclosure action belongs on dismissal of action.

A person who disturbs or interferes with the possession of a receiver is guilty of a contempt of court, and is liable to be committed (*k*). In extreme or aggravated cases the court will, for the purpose of vindicating its authority, order a committal (*l*); but it does not ordinarily punish Committal, &c. for disturbance of receiver.

(*e*) *Brooks v. Greathead*, 1 J. & W. 178.

(*i*) *Wright v. Mitchell*, 18 Ves. 292.

(*f*) *Britton v. M'Donnel*, 5 Ir. Eq. 275; *Re Stack*, 13 Ir. Ch. 213.

(*k*) *Supra*, pp. 192, 197.

(*g*) *Davy v. Price*, W. N. 1883, 226.

(*l*) *Helmores v. Smith*, 35 Ch. D. 449; *Broad v. Wickham*, 4 Sim. 511 (application to commit a person for taking forcible possession against a receiver).

(*h*) *Paynter v. Carew*, 18 Jur. 417.

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by actual committal. The court is generally satisfied with ordering the party in contempt to pay the costs and expenses occasioned by his improper conduct, and also the costs of the application to commit (*m*). In some cases an injunction restraining the interference may be an appropriate and sufficient remedy (*n*). Thus, where the contempt consists in entering upon land in the possession of a receiver, or in bringing an action against a receiver, or against a person over whose property a receiver has been appointed, the course of the court is to grant an injunction, restraining the party in contempt from trespassing or prosecuting the action, as the case may be, at the same time ordering him to pay the costs of the application to commit (*o*). In such a case, whether the person bringing an action did or did not know that a receiver had been appointed, or however clear his right may be, the court will restrain the prosecution of the action if it was brought without leave (*p*). In *Turner v. Turner* (*q*), the agents of the receiver in the cause, acting upon leave given by the court, having taken forcible possession of a house occupied by a servant of one of

(*m*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 119; *Hawkins v. Gathercole*, 1 Drew. 18; *Fripp v. Bridgrater, &c.*, *Railway Co.*, 3 W. R. 356; *Lane v. Sterne*, 3 Giff. 629; *Ex parte Hayward*, 45 L. T. 326. A partner who had got in debts adversely to the receiver was ordered within a week to make an affidavit of the amount, and to pay that amount to the receiver, and in default to be committed: *Parker v. Pocock*,

30 L. T. 458.

(*n*) *E.g., Dixon v. Dixon* [1904], 1 Ch. 161.

(*o*) *Johnes v. Claughton*, Jac. 573; *Aston v. Heron*, 2 M. & K. 390; *Tink v. Ruddle*, 10 Beav. 318; *Evelyn v. Lewis*, 3 Ha. 473; *Ames v. Birkenhead Docks*, 20 Beav. 354; *Bayly v. Went*, W. N. 1884, 197; 51 L. T. 765.

(*p*) *Evelyn v. Lewis*, 3 Ha. 473.

(*q*) 15 Jur. 218.

the defendants, an order was made restraining that defendant from prosecuting an indictment against the agents. An action, however, against a person who professes to have acted under the authority of a receiver, will not be restrained unless it is clear that he has really been acting under that authority (*r*).

A motion to commit a person for disturbing the possession of a receiver is improper, if made long after the act complained of, and not for the protection of the receiver's possession, but in order indirectly to compel payment of expenses, after settlement of the question relating to the possession. The proper course is to make directly any application for the payment of expenses or costs which may be warranted by the circumstances (*s*).

The court will not protect a sheriff who executes process after notice from a receiver that he is in possession (*t*).

Sheriff may not disturb possession of a receiver.

A sheriff who seizes goods in the possession of a receiver is guilty of a contempt of court (*u*), and may be committed, even though the act is really the act of his under-sheriff, and there is no reason to infer that it is the personal act of the sheriff (*x*). In a case, however, where an under-sheriff had seized goods in the possession of a receiver, the court, on the submission of the sheriff, abstained from committing him, but ordered him to withdraw from possession, and to pay the costs. It was considered that this order was sufficient, under the

(*r*) *Birch v. Oldis*, Sau. & Sc. 146.

(*s*) *Ward v. Swift*, 6 Ha. 312.

(*t*) *Try v. Try*, 13 Beav. 422; see, too, *Rock v. Cook*, 2 Ph. 691,

where the sheriff entered under a *fi. fa.* issued out of Chancery.

(*u*) *Lane v. Sterne*, 3 Giff. 629.

(*x*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 112.

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circumstances of the case, for the maintenance of the jurisdiction (*y*).

Where a sheriff has taken property, part of which is claimed by a receiver, the latter will be directed to give a list of the property claimed by him to the sheriff, who will be ordered to withdraw from possession of the specified property (*z*).

A sheriff may also be restrained, if necessary, from compelling a receiver to interplead, and may be ordered to pay the costs of proceedings for that purpose. If the execution creditor is before the court, he will be restrained from proceeding against the sheriff in relation to the property seized by him, or any other property in the possession of the receiver. If the execution creditor is not before the court, this cannot be done, but the sheriff may come to the court for protection, if necessary (*a*).

Where a liquidator is in possession, a receiver appointed by mortgagees under a deed must ask leave to take possession.

Where, after a liquidator has taken possession of property, a receiver of that property is appointed by mortgagees in exercise of a power given to them by their mortgage deed, the receiver must ask leave to be let into possession: he would be in contempt were he to take possession without leave of the court, so as to dispossess an officer of the court already in possession (*b*).

(*y*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. p. 119.

(*z*) *Wilmer v. Kidd*, Seton, 7th ed. p. 729.

(*a*) *Russell v. East Anglian Railway Co.*, 3 Mac. & G. 120, 122.

(*b*) *Re Henry Pound, Son, & Hutchins*, 42 Ch. D. 402; *supra*, p. 145. As to the respective

rights of a receiver for debenture holders of a company, and the company's liquidator, to the custody of the books and documents of the company, see *supra*, p. 80. As to the duty of a receiver in regard to preferential debts of a company, see p. 246, *infra*.

The court may empower a claimant, who asserts a right Chap. VI. against a receiver, to abate an obstruction. In such a case, the proper form of order is to give the claimant leave, notwithstanding the receiver, to pursue any remedies, or do any acts, that he may lawfully take or do to abate the obstruction (c).

(c) *Lane v. Caysey* [1891], 3 Ch. 411.

CHAPTER VII.

POWERS AND DUTIES OF A RECEIVER.

Chap. VII. THE general duty of a receiver may be said to be to take possession of the estate, or other property, the subject-matter of dispute in the action, in the room or place of the owner thereof; and, under the sanction of the court, when necessary, to do all such acts of ownership, in relation to the receipt of rents, compelling payment of them, management, letting lands and houses, and otherwise making the property productive for the parties to be ultimately declared to be entitled thereto, as the owner himself could do if he were in possession.

Parties
required to
deliver up
possession.

Where parties to an action are directed by the order appointing a receiver to deliver up to him possession of such parts of the property as are in their holding (*a*), the receiver, as soon as his appointment is complete, should apply to them to deliver up possession accordingly. If any of them refuse to do so, the receiver should report the refusal to the solicitor of the party having the conduct of the proceedings, who should then serve the refusing parties or party personally with the order directing possession to be delivered up (*b*). A time within which the delivery of possession is to be made must be specified in the order, and the order must be indorsed in the manner prescribed by R. S. C. Order XLI. rule 5 (*c*).

(*a*) *Supra*, p. 12.

(*c*) *Savage v. Bentley*, W. N.

(*b*) *Green v. Green*, 2 Sim. 430. 1904, 89; 90 L. T. 641.

If possession is still withheld from the receiver, an application should be made, by motion *ex parte*, for a writ of possession to put the receiver in possession pursuant to the order; and the application should be supported by an affidavit of service of the order, and of non-compliance (*d*). The writ cannot, however, be issued unless the explicit directions of R. S. C. Order XLI. rule 5, with respect to the contents and indorsement of the order directing the delivery up of possession, have been complied with (*e*).

If any party to the proceedings who is in possession of the property in question, or any part of it, is not ordered to deliver up possession to the receiver, he is not bound to do so; but he will be charged with an occupation rent for the property in his possession (*f*); such occupation rent to be paid only from the date of demand of possession by the receiver, and not from the date of the order appointing the receiver (*g*). A person in possession will not be ordered, on interlocutory motion before trial, to pay an occupation rent for a period antecedent to the order fixing the occupation rent. That order is the origin of his tenancy, and consequently his liability to pay rent can only commence as from the date of the order (*h*).

If tenants in possession of real or leasehold estates, over which a receiver is appointed, are directed by the order to attorn to the receiver (*i*), the receiver should,

Tenants
should be
required to
attorn.

(*d*) R. S. C. Ord. XLVII.; or, W. R. 651.
semble, proceedings may be taken for contempt; see *Savage v. Bentley*, *infra*. (*g*) *Yorkshire Banking Co. v. Mullan*, 35 Ch. D. 125.

(*e*) *Savage v. Bentley*, W. N. 487, at p. 488.
1904, 89; 90 L. T. 641. (*h*) *Lloyd v. Mason*, 2 M. & C.

(*f*) *Randfield v. Randfield*, 7

(*i*) *Supra*, p. 12.

Chap. VII. as soon as his appointment is complete, call on them to attorn accordingly (*k*).

If any tenant refuses to attorn to the receiver, the party prosecuting the order should serve him personally with a copy of the order for the appointment of a receiver, and of the order or certificate completing the appointment (*l*), and also with a notice in writing, signed by the receiver, requiring him to attorn and pay (*m*). If he still refuses to attorn, the tenant should be served with notice of motion to attorn and pay within a limited time after service of the order to be made on the motion (*n*).

The person served may appear on the motion, and inform the court whether he is in possession as tenant or not (*o*). If he does not appear, the order will be made upon affidavit of service of the notice of motion, orders,

(*k*) The attornment to a receiver appointed by the court constitutes a tenancy by estoppel between the tenant and the receiver, which the court applies to the purpose of collecting and securing the rents till a judgment can be pronounced, taking care that the tenants shall be protected, both while the receiver continues to act, and also when, by the authority of the court, he is withdrawn: *Evans v. Mathias*, 7 E. & B. 602. The attornment creates a tenancy between the tenant and the receiver only, and does not enure for the benefit of the person who may ultimately be found to be entitled to the legal estate, so as to enable him to

distrain: *Ib.* For a case in which a tenant was not estopped by payment of rent to a receiver appointed under the Conveyancing Act, 1881, see *Serjeant v. Nash, Field & Co.* [1903], 2 K. B. 304.

(*l*) *Supra*, p. 172.

(*m*) Dan. Ch. Pr., 7th ed. p. 1438: as to form of notice to tenant to attorn, and form of attornment, see Dan. Ch. Forms, 5th ed.

(*n*) As to form of notice of motion for tenant to attorn and pay rent, see Dan. Ch. Forms, 5th ed.

(*o*) *Reid v. Middleton*, T. & R. 457; *Hobhouse v. Hollcombe*, 2 De G. & Sm. 208.

certificate, and notice to attorn, and proof by affidavit Chap. VII. of the refusal to attorn(*p*). The order will be made without costs in cases where the tenant had reasonable ground for refusing to attorn(*q*).

A copy of the order, indorsed in the usual manner, is then served personally upon the person thereby directed to attorn(*r*). If the person so served still refuses to attorn, an application should be made for leave to issue a writ of attachment against him(*s*).

In cases where it does not clearly appear what is the nature of the interest of a person in possession of property over which a receiver has been appointed, it is not necessary to make him a party to the action. The court will, upon allegation that he is a tenant, treat him as a tenant and require him to attorn, unless he can satisfy the court that he holds possession in some other character(*t*). In *Reid v. Middleton* (*u*) it appeared that a tenant in possession had not agreed to pay any specific rent, and an order was consequently made that an occupation rent should be settled by the Master, and that the tenant should pay the arrears and future payments of the occupation rent.

If a judgment creditor is in possession under his judgment, the court cannot order him to attorn(*x*).

(*p*) Dan. Ch. Pr., 7th ed. p. 1438; *Hobson v. Shearwood*, 19 Beav. 575. As to form of affidavit in support of motion to attorn, see Dan. Ch. Forms, 5th ed.

(*q*) *Hobhouse v. Hollcombe*, 2 De G. & Sm. 208. Comp. *Hobson v. Shearwood*, 19 Beav. 575.

(*r*) Dan. Ch. Pr., 7th ed. p. 1438.

(*s*) R. S. C. Ord. XLII. rr. 7, 26; Ord. XLIV. r. 2.

(*t*) *Reid v. Middleton*, T. & R. 455.

(*u*) *Ib.*

(*x*) *Davis v. Duke of Marlborough*, 2 Sw. 118.

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Delivery of documents by solicitor.

Delivery of court rolls.

Rents in arrear, &c.

A solicitor will be ordered to produce and deliver up to a receiver appointed in an administration action documents over which he has a lien for costs (*y*).

The court will, on the application of the lord of a manor, order the steward, who holds the court rolls as the lord's agent, to deliver them up to the receiver (*z*).

A receiver of rents is entitled to all rents in arrear at the date of his appointment (*a*), and to all rents which accrue during the continuance of his receivership; and an order may be obtained, on motion or summons with notice to the tenant, for payment thereof by him to the receiver, notwithstanding that he may not have attorned. The tenant may be ordered to pay the costs of the application (*b*).

A receiver for debenture holders has no right to the rents in arrear when he goes into possession of property over which the debentures constituted only a floating charge, as against specific assignees of such arrears; but the case is otherwise where the arrears of rent claimed

(*y*) *Re W. Caudery*, 54 S. J. 444; following *Re Harkes* [1898], 2 Ch. 1; and see *Re Rapid Road Transit Co.* [1909], 1 Ch. 96. As to right of receiver for debenture holders to money in the hands of a solicitor in respect of future costs, see *Re British Tea Table Co.*, 101 L. T. 707.

(*z*) *Raves v. Raves*, 7 Sim. 624; *Windham v. Giubelei*, 40 L. J. Ch. 505.

(*a*) *Codrington v. Johnstone*, 1 Beav. 524; *M'Donnell v. White*, 11 H. L. 570; *Russell v. Russell*,

2 Ir. Ch. 574. Although the tenants are only responsible from the time when the order to pay their rents to the receiver is served on them, a person entitled to receive such rents is bound as from the date of the order for a receiver, if he has notice of the order: *Hollier v. Hedges*, 2 Ir. Ch. 376; see *Mullarkey v. Donohce*, 16 L. R. Ir. 370.

(*b*) *Hobson v. Shearwood*, 19 Beav. 575. As to form of notice of motion or summons, see Dan. Ch. Forms, 5th ed.

by the specific assignees thereof are in respect of property specifically charged by the debentures (c). Chap. VII.

A person who admits a sum of money to be due from him to the estate cannot dispute the right of the receiver to collect it (d).

Although a receiver is entitled to all arrears of rent at the date of his appointment, produce not converted into money, which has been separated from the estate before the date of the order, does not belong to the receiver. Where, therefore, a manager of a West Indian estate was appointed, with directions to receive and remit the rents and produce, the consignees were not ordered to pay into court surplus moneys arising from the produce of the estate, which had been severed and shipped to the consignees, but had not been received by them at the date of the order (e).

A receiver appointed previously to the execution of a lease may, though not a party to the lease, bring an action by direction of the judge for rent and arrears of rent, where the rent is reserved to the lessor or his successors or the receiver for the time being appointed to receive the same, and the lease contains a covenant by the defendant with the lessor and his successors, and also with the receiver for the time being, for payment of the rent (f).

When the order directs that the receiver shall keep down the interest of incumbrances, or make any other payments, he must, of course, comply with the order, and the sums so paid by him will be allowed in his accounts. He must, however, take proper receipts from the persons

Duty of receiver to take proper receipts.

(c) *Re Ind, Coope & Co.* [1911], 2 Ch. 223.

(e) *Codrington v. Johnstone*, 1 Beav. 520.

(d) *Wood v. Hitchings*, 2 Beav. 294.

(f) *Lloyd v. Byrne*, 22 L. R. Ir. 269.

Chap. VII. to whom he makes the payments, and it must be remembered that, in passing his accounts, he will be subject to the rules to which all other accounting parties are subject (*g*), and accordingly will be allowed to discharge himself by affidavit only as to payments which are under 40s.: for all other payments he must produce proper vouchers (*h*).

A receiver is only justified in paying to the person named in an order for payment, or on a power of attorney duly executed by him. Express authority for payment in any other way must be shown by the receiver, on peril of being disallowed credit therefor in vouching his accounts. A solicitor having the carriage of the proceedings has not as such, and in the absence of special authority in that behalf, power to give a valid receipt for money ordered to be paid by a receiver to his client (*i*).

Distress. After a tenant has, by attorning to a receiver, created a tenancy between him and the receiver (*k*), the receiver may distress upon the tenant in his own name, and on his own authority, without leave obtained from the court (*l*). Before attornment the receiver must distress in the name of the person having the legal estate (*m*).

(*g*) Dan. Ch. Pr., 7th ed. pp. 854, 1446.

(*h*) *Ib.*

(*i*) *Re Browne*, 19 L. R. Ir. 133.

(*k*) See *Evans v. Mathias*, 7 E. & B. 602.

(*l*) *Pitt v. Snowden*, 3 Atk. 750; *Bennett v. Robins*, 5 C. & P. 379; see, too, *Morton v. Woods*, L. R. 3 Q. B. 668. A receiver may employ a bailiff to make a distress: *Dancer v. Hastings*, 4

Bing. 2; 12 Moo. 34. As to distress in cases where a receiver has been appointed by a mortgagee under the power conferred by the Conveyancing Act of 1881, see *Woolston v. Ross* [1900], 1 Ch. 788, *infra*, p. 340; also *Serjeant v. Nash, Field & Co.* [1903], 2 K. B. 304, where a receiver was held liable in damages for a wrongful distress.

(*m*) *Hughes v. Hughes*, 3 Bro. C. C. 87; 1 Ves. Jr. 161.

At the instance of a purchaser who had been let into possession a receiver was restrained from distraining for arrears of rent due from a former tenant on the ground that a receiver will not be permitted to utilise the legal estate so as to injure the person having the best title to it (*n*). Chap. VII.

Leave that the receiver may distrain in the name of the person having the legal estate may always be obtained from the court on motion (*o*), and is now usually obtained on summons. If there is any doubt as to who has the legal right to the rent, the receiver should make an application to the court for directions; but where there is no doubt as to who has the legal right to the rent, it is conceived that the leave of the court to distrain in the name of the person having the legal estate is not generally necessary (*p*). Where, however, the person having the legal estate is a trustee, and the receiver is a solicitor, the latter should bear in mind that the court may be unwilling to empower him to institute proceedings against a tenant for arrears of rent if the trustee is opposed to that course, and he should therefore abstain from instituting such proceedings on his own authority. A reference to the Master as to the propriety of proceeding in the name of the trustee was refused in such a case (*q*).

Instead of moving that he may have liberty to distrain in the name of the person having the legal estate, the receiver may obtain an order on motion or summons, with notice to the tenants, for payment by the tenants

(*n*) *Re Powers*, 39 W. R. 185.

(*o*) *Hughes v. Hughes*, 3 Bro. C. C. 87; 1 Ves. Jr. 161. As to form of order, see Seton, 7th ed. p. 763.

(*p*) *Pitt v. Snowden*, 3 Atk.

750; *Brandon v. Brandon*, 5 Madd. 473.

(*q*) *Della Cainea v. Hayward*, M'Clell. & Y. 272.

Chap. VII. notwithstanding that they may not have attorned (*r*), or he may apply that the tenants do attorn, and that distresses may afterwards be made in his name. If the tenants oppose, on the ground of the pendency of an action for the same rent commenced before the appointment of the receiver, the motion or summons may be ordered to stand over until the action has been tried (*s*).

In *Brandon v. Brandon* (*t*) it was stated to be the practice for the receiver to distrain, at his own discretion, for rent in arrear within the year; but that as to rent in arrear for more than a year an order of the court was necessary. *Brandon v. Brandon* (*u*) was a case in which the legal estate was in trustees, and a motion was made that the receiver might be at liberty to distrain in the name of the trustees, so that the statement made by Leach, M.R., is, perhaps, to be taken as referable to cases where the legal estate is outstanding, and there has been no attornment to the receiver. Inasmuch as a receiver is entitled to all arrears of rent, he may, it is conceived, if there has been attornment, distrain without obtaining the leave of the court for all arrears accrued during the tenancy.

An application for leave to distrain is usually made by summons in chambers, but it is not usual to draw up an order in such cases, the minute made by the Master of the directions given being deemed sufficient (*x*).

(*r*) *Hobson v. Shearwood*, 19 M.R.
Beav. 575; *supra*, pp. 217, 218.

(*s*) *Hobhouse v. Hollcombe*, 2
De G. & Sm. 208; as to form of
notice of motion for tenant to
attorn, and pay rent, and affidavits, see Dan. Ch. Forms, 5th ed.

(*t*) 5 Madd. 473, *per* Leach,

(*u*) *Ubi supra*.

(*x*) Dan. Ch. Pr., 7th ed.
p. 1443. As to forms of
summonses for leave for re-
ceiver to distrain and to bring
actions for arrears of rent, see
Dan. Ch. Forms, 5th ed.

In an old case, where a plaintiff, upon whose application a receiver had been appointed, was proceeding both at law and also in equity, the court would not give leave to the receiver to distrain upon the tenants unless the plaintiff would undertake to proceed in equity only, because the tenants might file bills of interpleader (*y*). Chap. VII.

Where a receiver is appointed without prejudice to the rights of any prior incumbrancer, and, at the date of the order, a bailiff is in possession under a distress, the landlord need not apply for leave to proceed with the distress (*z*).

The abatement of an action in which a receiver has been appointed does not determine the appointment, or suspend the receiver's authority to proceed against the tenants. His authority continues until an order is made for his removal. Until such an order is made, a receiver may distrain or perform his other duties, notwithstanding a total abatement of the action (*a*).

It was held in Ireland that a tenant, who rescued a distress made by the receiver, would not be attached for the rescue, but that the receiver must proceed at common law or under the statute applicable to the case (*b*).

A receiver appointed at the instance of the mortgagee of an underlease is the landlord of the premises within the meaning of that term in section 1 of the Landlord and Tenant Act, 1709 (8 Anne, c. 18), and, as such, entitled to be paid by an execution creditor, before the latter can proceed with his execution, one year's arrears of rent owing by a tenant; but a yearly sum expressed

(*y*) *Mills v. Fry*, Coop. 107. 291; *Brennan v. Kenny*, 2 Ir.

(*z*) *Engel v. South Metropolitan*, Ch. 583.

olitan, &c., Co., W. N. 1891, 31. (*b*) *Fitzpatrick v. Eyre*, 1

(*a*) *Newman v. Mills*, 1 Hog. 171.

Chap. VII. to be paid for goodwill and fixtures is not rent within the section (c).

Duty of
receiver
appointed
over
personal
property.

Where a receiver is appointed by the court to get in outstanding personal property, it is his duty to collect all that he can get in. In a case in which part of the assets in a debenture holder's action consisted of a doubtful claim against the directors of the company, which the majority of the debenture holders were unwilling to enforce, the receiver was directed to sell the claim by auction (d). If a receiver of book debts is appointed, he must give notice of his appointment to the debtors, in order to take the debts out of the order and disposition of the defendant in the event of his becoming bankrupt (e). A receiver for debenture holders, whose debentures expressly or impliedly confer a power to create a charge in priority to the debentures, cannot obtain priority in respect of a debt due to the company over a person in whose favour a charge thereon has been created and of whose charge he has knowledge, by giving prior notice to the debtor (f). An order appointing a receiver of outstanding personal estate generally contains a direction that the parties in whose possession the same may be shall deliver over to the receiver all securities in their possession for such outstanding personal estate, together with all books and papers relating thereto (g). If the

(c) *Cox v. Harper* [1910], 1 Ch. 480.

(d) *Wood v. Woodhouse and Rawson, Ltd.*, W. N. 1896, 4. As to sale of fixtures by receiver, see *Re Glasdir Copper Mines* [1904], 1 Ch. 819; and as to the power of a receiver appointed to wind up an Irish Loan

Society to compromise claims, see *O'Reilly v. Connor* [1904], 2 I. R. 601.

(e) *Rutter v. Everett* [1895], 2 Ch. 872.

(f) *Re Ind, Coope & Co.* [1911], 2 Ch. 223.

(g) *Seton*, 7th ed. p. 725.

parties in whose hands such securities and papers are refuse to deliver them up, the receiver should give notice of the refusal to the party conducting the proceedings, and the latter must take the necessary steps for enforcing the order (*h*). If persons indebted to the estate refuse to pay the amounts due from them, the sanction of the judge must be obtained to the receiver suing them (*i*). Applications for the sanction of the judge in such cases are usually made by summons, supported by affidavits or other evidence of the facts (*k*).

The old Chancery remedy by way of writ of assistance, although in a great measure superseded by the writ of possession (R. S. C. Ord. XLVII.), is still available in cases not met by R. S. C. Ord. XLVIII., *e.g.*, where chattels, such as documents, are in peril, and a receiver appointed by the court is unable to serve the respondent or to obtain possession, the respondent having absconded and his clerks declining to give up the custody of the documents (*l*).

After a receiver has been appointed by the court at the instance of a mortgagee the court may direct such proceedings as it considers proper to be commenced or carried on by the receiver at the expense of the mortgaged property: neither the mortgagor nor the mortgagee has an absolute right to insist on or prohibit an action being brought. These principles are well illustrated in a case in which a company had com-

Action by
receiver.

(*h*) Dan. Ch. Pr., 7th ed. p. 1444.

John, M'Clell. 575.

(*i*) *Ib.* The court will not empower a receiver to sue for debts, unless it appears likely that some fruits may be derived from his doing so: *Davie v.*

(*k*) As to form of summons, see Dan. Ch. Forms, 5th ed.

(*l*) *Wyman v. Knight*, 39 Ch. D. 165; see *ib.* as to form of order.

Chap. VII. menced an action against its first mortgagees and a purchaser from them to set aside as fraudulent a sale by the former to the latter: the purchaser, having subsequently acquired the interest of a holder of debentures for 10,000*l.* in the company, commenced in his name a debenture holder's action against the company and obtained the appointment of a receiver therein. The court on the application of the company ordered the receiver to carry on proceedings in the first action upon the terms that his costs should be a first charge on the company's assets, notwithstanding the protest of the plaintiff in the second action (who was the purchaser's nominee) that assets upon which the purchaser had in effect a first charge would be used to support a claim against him in another capacity (*m*).

As a general rule, a receiver cannot maintain an action to compel obedience to an order for the delivery of goods, or for the payment of money to him by a party to the action in which the receiver was appointed. There may, however, be exceptional cases in which a receiver can bring an action in his own name—where, for instance, he is the holder of a bill of exchange. In that case he can maintain an action under the law merchant, not because he is a receiver, but because he is the holder of the bill (*n*). “So, too, if he is possessed of chattels as receiver and those chattels are unlawfully detained from him, he may well be able to maintain an action to recover them as being the person in possession of them, quite independently of the fact that he is a receiver.

(*m*) *Viola v. Anglo-American Cold Storage Co.* [1912], 2 Ch. 305. 2 Ch. D. 423, as explained in *Ex parte Sacker*, 22 Q. B. D. 179.

(*n*) *Ex parte Harris, Re Lewis*,

And there may be other cases in which, having an independent cause of action, the fact that he is receiver does not disqualify him from suing. But in such cases he does not sue in his character of receiver" (o).

In the case of *Moss Steamship Co. v. Whinney* (p) certain of the learned lords expressed the opinion that if a receiver for debenture holders has created a lien over goods of the company under his control, he cannot recover such goods without discharging the lien, although he may have acted *ultra vires* in creating it, and it might be void against the company in case it intervened to claim the goods (q).

In *Husey v. London Electric Supply Corporation* (r) a receiver in possession of an hotel brought an action in his own name against an electric company for an injunction to restrain that company from discontinuing the supply of electric current to the hotel, and no objection appears to have been taken to the plaintiff's ability to maintain the action.

Where, in a partnership action, a receiver has been appointed to collect the proceeds of goods comprised in a charge in favour of the plaintiffs and received by a defendant, and that defendant has, by a subsequent order in the action, been ordered to pay specific sums so received to the receiver and has failed to do so, the receiver, not being in a position to sue in his own name, either at law or in equity, for the money, is not a creditor of that defendant, entitled to present a petition in bankruptcy

Receiver as
petitioning
creditor.

(o) *Per* Fry, L.J., in *Ex parte Sacker*, 22 Q. B. D. at p. 185.

(p) [1912] A. C. 254; see *infra*, p. 306.

(q) *Per* Lord Loreburn at

p. 257: *per* Lord Mersey at p. 275; but see *per* Lord Atkinson at p. 267.

(r) [1902] 1 Ch. 411.

Chap. VII. against him, within the meaning of section 6 of the Bankruptcy Act, 1883 (*s*). But a receiver appointed in a partnership action, to whom a judgment debt due to the partnership has been assigned, so that he could maintain an action at law for the debt, is a good petitioning creditor of the judgment debtor, although the money, if and when received, will fall to be dealt with by the court in the partnership action (*t*).

The conduct of an action is not nowadays given to a receiver (*u*).

A receiver appointed on behalf of debenture holders of a company in liquidation, who are entitled to a charge on the uncalled capital of the company, cannot be ordered to make a call, but may be empowered to take proceedings in the name of the liquidator for getting in the call (*x*): he will, however, in that case be required to indemnify the liquidator against costs (*y*).

Receiver
of partner-
ship.

When a receiver is appointed to manage a partnership concern, he must be guided by the terms of the order of appointment, keeping in mind the general maxim that, as his authority flows from the court, he must, in every case not covered by the terms of the order appointing him, act under a special order to be obtained from the court.

Power and
duty of
receiver as
to letting
estates.

A receiver being appointed by the court over landed estate for the management of the estate, it was formerly

(*s*) *Ex parte Sacker*, 22 Q. B. D. 179.

(*t*) *Re Macoun* [1904], 2 K. B. 700.

(*u*) *Re Hopkins*, 19 Ch. D. 62.

(*x*) *Fowler v. Broad's Patent Night Light Co.* [1893], 1 Ch. 724; *Re Westminster Syndicate*, 99 L. T. 924. As to whether

the uncalled capital is included in the floating charge, see *Re Streatham Estates Co.* [1897], 1 Ch. 15; *Re Handyside & Co.*, 131 L. T. Jo. 125.

(*y*) *Harrison v. St. Etienne Brewery Co.*, W. N. 1893, 108; *Re Westminster Syndicate*, 99 L. T. 924.

a motion of course to give liberty for a receiver to set or let. An express power to that effect was afterwards inserted in most orders (z). By an Order made in April, 1828, it was ordered that, in any order directing the appointment of a receiver of a landed estate, there should be inserted a direction that he should have power to set and let with the approbation of the Master, who was empowered, without the special order of the court, to receive and report on proposals from the parties interested for the management or letting of the estate (a). At the present day, a direction to manage or set and let is not inserted in an order appointing a receiver over real or leasehold estate, the judge having power to give any direction in chambers as to the management of the estate (b).

Under the old practice, the course of the court was to order the Master to receive proposals as to leases of property over which a receiver had been appointed, and to report his opinion thereon. The court did not delegate to the Master the power of approving or sanctioning leases. The order was simply that he should receive proposals for leases, and report his opinion thereon to the court (c). A receiver could not, without the sanction of the court, set or let (d), even for a single year (e). A lease granted by a receiver without the consent of the court, evidenced by the Master's report, was invalid (f).

(z) *Neale v. Bealing*, 3 Sw. 374; *Symons v. Symons*, 2 Y. & C. 1.

(a) See *Thornhill v. Thornhill*, (d) 1 Ves. Jr. 138.

14 Sim. 600; *Duffield v. Elwes*, (e) *Wynne v. Lord Newborough*, 11 Beav. 590. ib. 164.

(b) Seton, 7th ed. 725; see, (f) *Durnford v. Lane*, 2 Madd. Ch. Pr., 2nd ed. 244.

(c) *M'Dermott v. Kealey*, Jac.

Chap. VII. If, however, a receiver had contracted for a lease without the consent of the court, the court would, on motion, refer it to the Master to see if the contract was for the benefit of the parties, and what better rent could be obtained. If the contract was approved of, it was confirmed (*g*).

Under the present practice a receiver may let at his discretion for a year certain or less, or for any time not exceeding three years, without applying for the sanction of the judge (*h*). But the power of a receiver to grant leases is limited to such parol leases as are authorised by the second section of the Statute of Frauds' (*i*). If a receiver grants a lease for a longer period than three years, the lease will be binding as between him and the person who takes the lease, because the latter cannot be suffered to repudiate his agreement, and say that the lease is invalid, on the ground that it was not made by the person having the legal estate or power of leasing (*k*). As between the lessee, however, and the owner of the legal estate, the lease has, in the absence of special circumstances, no binding force, even though it may have been made with the sanction of the judge. The powers of the receiver are limited to receiving proposals and making arrangements as to the leasing of the property over which he has been appointed receiver, and granting parol leases of the kind already referred to. He has no power to transfer the legal estate in the property, nor can such a power be given to him by the judge (*l*). Leases of property in the hands of a receiver

(*g*) *Anon.*, 2 Madd. Ch. Pr., 244.

(*h*) *Shuff* v. *Holdway*, Dan. Ch. Pr., 7th ed. p. 1443.

(*i*) 29 Car. 2, c. 3.

(*k*) *Dancer* v. *Hastings*, 4 Bing. 2; 12 Moo. 34.

(*l*) See *Gibbins* v. *Howell*, 3 Madd. 469; *Evans* v. *Mathias*, 7 E. & B. 602, *supra*, p. 216.

should be made or signed by the person having the legal estate or power of leasing. If necessary, recourse may be had to any of the statutory provisions which confer jurisdiction on the court to sanction leases (*m*). Chap. VII.

A receiver should apply for liberty to re-let before an existing lease expires. If he neglects to do so, he is at liberty to make what he can of the property during the current year, but he will be visited with any loss which may arise (*n*).

Where the court directs a receiver to give to any person the option of being tenant of some particular item of property, it generally reserves power to the receiver to inspect the state and condition of the property (*o*).

In cases where the estate over which a receiver is appointed is in the East Indies, a colony, or a foreign country, it is usual to give the receiver more extensive powers of managing and letting than in the case of estates situated in this country (*p*). A reference to the Master is generally directed, to inquire what should be the term, beyond which the receiver should not be permitted to let. This is done with the view of obviating the necessity of a series of applications to the court for permission to let (*q*).

A receiver must let the estate over which he is acting as receiver to the best advantage. He is bound to obtain the best terms (*r*). He may not, either in his own name or through the medium of a trustee, become

(*m*) Dan. Ch. Pr., 7th ed. p. 1443, and Chap. XXXVII. (*p*) *Morris v. Elme*, 1 Ves. Jr. 139.

(*n*) *Wilkins v. Lynch*, 2 Moll. 499. (*q*) *Anon. v. Lindsay*, 15 Ves. 91.

(*o*) *Baylies v. Baylies*, 1 Coll. 545. (*r*) *Wynnev. Lord Newborough*, 1 Ves. Jr. 164.

Chap. VII. tenant of any part of the estate over which he is acting as receiver (*s*). A receiver cannot raise the rents on slight grounds without the leave of the court (*t*), nor can he abate the rents, or forgive the tenants their arrears, without the consent of the parties beneficially interested (*u*).

Mode in
which pro-
posals for
leases are
dealt with.

Applications with reference to property under the management of a receiver are usually made by summons at chambers. The judge at chambers receives proposals for the management and letting of the property from the parties interested, and gives his directions thereon.

The usual course is for the proposed tenant of any part of the property to enter into a provisional agreement to become tenant or lessee of it upon terms specified in the agreement, subject, however, to the approval of the judge. A summons for an order to carry the agreement into effect is then taken out by the plaintiff's solicitor and served on the parties interested. The application is supported by the production of the agreement and the affidavit of a land agent, or other competent person, stating the grounds on which, in his judgment, the agreement should be adopted. The power to demise on the terms specified should also be shown by proper evidence. If the agreement is approved, either an order is made directing it to be carried into effect, and that the lease to be granted in pursuance thereof be settled by the judge, either absolutely or in case the parties differ; or, to save expense, the Master endorses a

(*s*) *Meagher v. O'Shaughnessy*, 15 L. T. 23.

cit. Fl. & K. 207, 224; see, too,
Anderson v. Anderson, 9 Ir. Eq.
23; *Eyre v. M'Donnell*, 15 Ir.
Ch. 534. Comp. *King v. O'Brien*,

(*t*) *Wyne v. Lord Newborough*,
1 Ves. Jr. 164.

(*u*) *Evans v. Taylor*, Sau. &
Sc. 681.

minute of the approval on the summons, and adjourns the matter until the draft lease has been brought in for approval. Upon the draft lease, or a certified copy of the order (if any) approving the agreement, being left at chambers, a summons is taken out to settle the draft lease (*x*) ; or, if no order has been drawn up, an appointment for this purpose is given. The summons, or notice of the appointment, is then served on the parties interested. The draft lease is then settled either by the judge or by the Master, with the assistance, if necessary, of one of the conveyancing counsel. The draft is then engrossed in duplicate, and an affidavit is made, verifying the engrossment of the lease, and that of the counterpart, as being each a true and correct transcript of the draft as settled. A copy of this affidavit is left at chambers, with the engrossments and draft. The Master then signs a memorandum of allowance in the margin of each engrossment, and issues his certificate of the result of the proceeding, which is completed in the usual way ; or, if an order approving the agreement has been drawn up, an order is made approving the agreement and the lease. Where, as is often the case, the draft lease is settled at chambers before an order approving the agreement has been drawn up, the order may include an approval of the engrossments, thereby saving the expense of a certificate, which, indeed, is often dispensed with, the Master's memorandum of allowance, in the margins of the engrossments, being deemed sufficient evidence of the fact of the lease having been settled by the judge (*y*).

(*x*) As to forms of summons to approve of agreement to grant a lease, and of affidavits in support, and form of summons to settle draft lease, see Dan. Ch. Forms, 5th ed.

(*y*) As to form of affidavit verifying engrossments of lease

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Power of
receiver to
give notice
to quit.

A receiver appointed by the court over lands, with a general authority to let the lands from year to year, has thereby an implied authority to determine such tenancies by regular notices to quit (*z*). In *Mansfield v. Hamilton* (*a*) Lord Redesdale said that, the tenants of an estate being under the circumstances of that case tenants from year to year to the receiver, he would not turn them out without notices to quit.

If a tenant holds over after regular notice to quit given to him by a receiver, the court will give the receiver leave to sue the tenant for double the yearly value of the premises, under the statute 4 Geo. 2, c. 28, s. 1 (*b*). If a receiver has power to pay debts, he may pay an instalment of a debt, even though the effect of his doing so may be to stop the Statute of Limitations from running (*c*). But a payment made by a receiver, which is not authorised by the order appointing him, will not stop the statute from running (*d*); nor will payment by a person administering the estate of a person of unsound mind without an order appointing him receiver (*e*). A

and counterpart, form of certificate of settlement of lease, and minutes of order approving an agreement and the lease to be issued in pursuance thereof, see Dan. Ch. Forms, 5th ed. pp. 619, 620; see, too, Dan. Ch. Pr., 7th ed. pp. 865, 866.

(*z*) *Doe v. Reul*, 12 East, 61; *Crosbie v. Barry*, Jon. & C. 106; *Wilkinson v. Colley*, 5 Burr. 2697; *Jones v. Phipps*, L. R. 3 Q. B. 572.

(*a*) 2 Sch. & Lef. 30.

(*b*) *Wilkinson v. Colley*, 5 Burr. 2694.

(*c*) *Re Hale, Lilley v. Foad* [1899], 2 Ch. 107; and see *Wandsworth Union v. Worthington* [1906], 1 K. B. 420, where payment to guardians by a receiver under an order in lunacy of the income of the lunatic's estate (which was insufficient to discharge the sums due for maintenance) was held to take a claim for arrears of maintenance out of the statute.

(*d*) *Whitley v. Lowe*, 25 Beav. 421; 2 D. & J. 704.

(*e*) *Re Beavan* [1912], 1 Ch. 196.

receiver appointed on behalf of a mortgagee is the "agent" of the mortgagor within the statute 3 & 4 Wm. 4, c. 27, s. 40, and a payment of interest by him stops the running of the statute (*f*).

The receiver of the property of a criminal lunatic must pay to the Crown all arrears due under section 10 (3) of the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), in respect of the maintenance of the lunatic, the Statute of Limitations not applying to such a case (*g*).

As a general rule, the receiver of an estate must not, without the sanction of the court or judge, do any act which may involve the estate in expense. It is not proper for a receiver to defend, without that sanction, actions which may be brought against him (*h*). In a case where a receiver had, without the authority of the court, defended an action arising out of a distress made by him upon a tenant of the estate for rent, and was unsuccessful, the court refused to allow him his costs of the action (*i*). But if he successfully defends an action brought against him, without putting the estate to the expense of an application to the court, which he might have made for his own security, he will stand in the same position as to indemnity as if he had made that application (*k*).

Receiver must not involve estate in expense.

(*f*) *Chinnery v. Evans*, 11 419.
H. L. C. 115.

(*g*) *Re J.* [1909], 1 Ch. 574.

(*h*) *Anon.*, 6 Ves. 287; *Swaby v. Dickon*, 5 Sim. 629. The receiver should not wait to apply for leave to defend an action until just before trial: *Anon.*, 6 Ves. 286.

(*i*) *Swaby v. Dickon*, 5 Sim. 629; see *Re Montgomery*, 1 Moll.

(*k*) *Bristowe v. Needham*, 2 Ph. 190, 191. But whether he will, in any particular case, be indemnified in respect of his costs of defence will depend upon the nature of the action. See *Re Dunn* [1904], 1 Ch. 648, *infra*, p. 263. If the possession of a tenant under a receiver is disturbed, and no application is

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Again, a receiver must not, without the leave of the court, bring an action for the recovery of land (*l*).

A motion by the tenants of an estate, to restrain a receiver from doing acts which are within his authority, will be refused with costs; for they have no sufficient interest to support it (*m*).

A receiver of the rents and profits of real and leasehold estate may with propriety insure the property against damage by fire, either in his own name or in the names of trustees, and he will be allowed in his accounts the premiums which he has paid (*n*).

Power of
receiver as
to repairs.

A receiver appointed by the court may lay out small sums of money in customary repairs, or may allow the same to a tenant, but he may not apply money in repairs to any considerable extent without a previous application to the judge (*o*). It was at one time a rule of the Court of Chancery that the receiver of an estate could not lay out any money on it without a previous order of the court (*p*). At the present day the rule of the court is not so strict; but, speaking generally, it is conceived that a receiver ought not to expend at his own discretion, and without the sanction of the judge, more than 30*l.* a year (*q*), though there is no exact rule as to the amount of

made to the court to prevent the disturbance, the tenant is entitled to the costs of protecting his own possession: *Miller v. Elkins*, 3 L. J. Ch. 128.

(*l*) *Wynne v. Lord Newborough*, 1 Ves. Jr. 164; 3 Bro. C. C. 87; *Ward v. Swift*, 6 Ha. 312.

(*m*) *Wynne v. Lord Newborough*, 3 Bro. C. C. 88; 1 Ves. Jr. 164.

(*n*) *Re Graham, Graham v. Noakes* [1895], 1 Ch. 66, 71.

(*o*) *Waters v. Taylor*, 15 Ves. 25; *Ex parte Izard*, 23 Ch. D. 80.

(*p*) *Tempest v. Ord*, 2 Mer. at p. 56.

(*q*) Dan. Ch. Pr., 7th ed. p. 1440, note (*o*). Where the amount proposed to be expended by the receiver is small, the sanction of the judge will be

repairing that he may do upon his own responsibility (*r*). Chap. VII.
 If, however, more has been expended by him than a receiver is authorised to expend at his own discretion, the course of the court is to direct an inquiry into the circumstances of the expenditure, and to allow the amount expended, if, upon inquiry, the expenditure is found to have been reasonable, and beneficial to the estate (*s*).

Under the Rules of the Supreme Court, applications as to repairs are made to the judge in chambers, where the matter is inquired into, without previous order, before the repairs are authorised to be done (*t*).

If from their extent, or the circumstances under which money for repairs is claimed, the receiver feels any difficulty in allowing them to be done, he should apply to the plaintiff's solicitor to obtain the sanction of the judge. In order to obtain it, the plaintiff's solicitor takes out a summons, to the effect that the receiver appointed in the action may be directed to execute the repairs specified in the affidavits, and to expend moneys not exceeding a certain specified sum of money, the estimated cost thereof, and that he may be allowed the amount he may so expend in passing his accounts in the action. The summons is supported by evidence that the tenants are not liable to do the repairs, that the repairs ought to be

given on production to the Master of a letter from the receiver, stating the propriety of the intended expenditure, and the maximum amount to be laid out. *Ib*.

(*r*) *Re Graham, Graham v. Noakes* [1895], 1 Ch. 66, 72.

(*s*) *Att.-Gen. v. Vigor*, 11 Ves. 563; *Tempest v. Ord*, 2 Mer. 56; *Ex parte Izard*, 23 Ch. D. 80.

Comp. Re Langham, 2 Ph. 299.

(*t*) R. S. C. Ord. LV. r. 2 (13), which applies to all applications connected with the arrangement of property, including directions as to letting, and cutting and selling timber. See, too, *Seton*, 7th ed. p. 770; and, as to order giving the receiver liberty to expend money in repairs, *ib*. p. 765.

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done, and that the amount proposed to be expended is fair and reasonable. The order is drawn up by the registrar in the usual way.

If a receiver requires money to enable him to discharge his duties, the court will give him leave to borrow upon the security of the property in his hands. And indeed, in a debenture holders' action, the court may, in a case of emergency, empower the receiver to borrow money as a first charge on the undertaking, in priority even to the debentures, for the preservation of the property (*u*). But the court must be satisfied that the proposed expenditure is likely to be beneficial to everybody interested, or else that it is in the nature of salvage (*x*). Therefore, where the property is mortgaged, in priority to the debentures, for an amount exceeding what it is likely to realise, no power to borrow will be given (*x*).

A receiver in lunacy who was plaintiff in an action relative to certain property of the lunatic, upon which were mortgages which the mortgagee was threatening to call in, was, on application being made in the action, authorised to borrow upon security of the lunatic's property sufficient money to pay a commission to a proposed transferee of the mortgages as a consideration for his consenting to take the transfer (*y*).

Where a receiver in a debenture holders' action has power to "raise" money, this gives him by implication power to create a charge on the property the subject of the action, ranking in priority to existing debentures (*z*).

(*u*) *Greenwood v. Algesiras*
(*Gibraltar*) *Railway Co.* [1894],
2 Ch. 205, and see p. 316, and
Seton, 7th ed. p. 761.

(*x*) *Securities and Properties*
Corporation v. Brighton Alham-

bra, 62 L. J. Ch. 566.

(*y*) *Chaplin v. Barnett*, 28
T. L. R. 256; this order was
made under R. S. C. Ord. L.
r. 3.

(*z*) *Lathom v. Greenwich*

An order may be obtained in chambers, authorising a receiver to cut and sell timber, and to employ it, if necessary, in repairs (*a*). The court, before giving liberty to cut timber for repairs, will direct inquiries (*b*). Where there is a receiver, a sale of timber is usually effected under his direction (*c*). The receiver of an estate may obtain an order to grant a licence to win and get clay and brick earth on the estate, and to manufacture the same into bricks (*d*).

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Various applications as to the management of the estate.

An application by a person not a party to the action, for directions as to the management of real property by a receiver, may be made by summons at chambers (*e*).

Where the estate of a stranger has come into possession of the receiver in an action, and possession of it has been held by him with the acquiescence of such of the parties to the action as are not under disability, and without objection on behalf of any party under disability, the transaction is binding on all those parties; and they will be held responsible to the stranger for any rents of the stranger's estate received by the receiver and not paid over to the stranger, and also in regard to any dilapidations during the receiver's possession (*f*). This may be ordered on the application of the stranger, although he be not a party to the action (*g*).

Where estate of stranger comes into possession of receiver.

If, after a receiver has been appointed, a person has

Lessee of land in possession

Ferry Co., W. N. 1895, 77; 72 D. 723.

L. T. 790. See, further, p. 317.

(*a*) Seton, 7th ed. p. 766.

(*b*) Seton, 7th ed. p. 770.

(*c*) *Ib.* 766.

(*d*) *Ib.* 766.

(*e*) *O'Hagan v. North Wingfield Colliery Co.*, 26 Sol. J. 671; and see *Searle v. Choat*, 25 Ch.

(*f*) *Neate v. Pink*, 15 Sim. 452; S. C. 3 Mac. & G. 476, 484, commented upon in *Hand v. Blow* [1901], 2 Ch. at p. 728; comp. *Brocklebank v. East London Railway Co.*, 12 Ch. D. 839.

(*g*) *Ib.*

Chap. VII. entered into an agreement with the receiver to take the
 of receiver restrained from committing waste. lease of a farm, an action need not be brought to restrain the lessee from committing waste. The court will, on the application of the plaintiff in the action, grant an injunction, on motion in a summary way, against the lessee, notwithstanding that he be not a party to the action (*h*).

But, in a case which came before Shadwell, V.-C., in the year 1846, an incumbrancer on an annuity, which a receiver in the suit had been directed to pay to the annuitant, was refused an order, on his petition in the suit, for payment of his debt by the receiver out of the moneys payable to the annuitant. The incumbrancer not being a party to the suit, and the annuitant opposing the petitioner's prayer, the Vice-Chancellor held that he had no jurisdiction on the petition, and that a bill must be filed (*i*).

Receiver of leaseholds generally.

A receiver over land is an officer upon whom the performance of the obligations imposed by the possession of the land is devolved by the court. A receiver over leaseholds is bound in the first place, out of the sub-rents, to discharge the head-rent, where the right of the head-land is undisputed and unquestionable, without an order from the court for that purpose. If, in consequence of his default, the head-land is compelled to institute proceedings for the recovery of the head-rent, the receiver is held liable for costs, if rents have reached his hands. The sub-rents should be, in the first place, appropriated to the payment of the head-rent. When that has been paid, whatever surplus remains should be distributed in

(*h*) *Walton v. Johnson*, 15 Sim. 352; see, too, *Cusamajor v. Strode*, 1 Sim. & St. 381. (*i*) *Wastell v. Leslie*, cited 15 Sim. 453.

accordance with the interests of the parties to the action and the order of the court. If the receiver pursues a different course, and pays away sub-rents received without providing for the head-rent, choosing to speculate upon obtaining other funds wherewith to pay the latter, he does not act in accordance with the course of the court, and he will be compelled by the court to pay any arrears of the head-rent (*k*).

If any dispute or uncertainty as to the amount of rent due to the head-lessor exists, a safe course is to apply for an inquiry in chambers to ascertain the amount: or the receiver may wait until the head-lessor makes an application on the subject, and then appear by his solicitor, state the facts, and have the court's order shaped accordingly (*l*).

The two cases which have just been referred to (*m*) were decided on the principle that where the receiver, the officer of the court, is placed in the position of a tenant, he is bound to do as a just and honest tenant would. But where his position is not that of a tenant, but of a sub-tenant, as in the case of his being appointed receiver by the court in an action by a mortgagee by sub-demise of leaseholds against the mortgagor to enforce the security, he is not, any more than the mortgagee in whose right he was appointed, liable, whether in possession or not, to the head-lessor for rent or other outgoings. There is no equity entitling the head-lessor to claim rent, or damages for breach of (for instance) a repairing covenant in the head-lease, from the receiver by reason of his having

Receiver of
leaseholds
mortgaged
by sub-
demise.

(*k*) *Balfe v. Blake*, 1 Ir. Ch. 365.

R. 365; *Jacobs v. Van Boolen*,
34 Sol. J. 97.

(*m*) I.e., *Balfe v. Blake*, 1 Ir.
Ch. R. 365, and *Jacobs v. Van*

(*l*) *Balfe v. Blake*, 1 Ir. Ch. R. *Boolen*, 34 Sol. J. 97.

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occupied the mortgaged premises, even though he has, under order of the court, sold off the mortgagor's goods, and so in effect deprived the head-lessor of a landlord's remedy by distress. There is no principle of honour, honesty, or justice requiring the court to interfere in favour of the head-lessor in such a case (*n*).

Sale and removal of fixtures after determination of lease.

In *Re Glasdir Copper Works (o)*, after an order had been made, giving leave to the receiver appointed in a debenture holders' action to sell the trade fixtures on some mining property held by the company on lease, the company determined the lease by going into voluntary liquidation, and thereupon the lessor demanded possession of the leasehold premises, including the fixtures; but it was held that, notwithstanding the determination of the lease, the receiver was entitled within a reasonable time to remove the fixtures, and to sell them upon the premises comprised in the lease.

Duty of receiver when the tenants are interfered with.

When the receiver appointed in an action is informed by the tenants of property over which he is receiver that the defendants have interfered with the rents, it is his

(*n*) *Hand v. Blow* [1901], 2 Ch. 721, at pp. 726, 728, 737. Consider *Re John Griffiths Cycle Corporation*, W. N. 1902, 9; 85 L. T. 776. There, a receiver appointed by the court paid, under an order, 200*l.* into court, for security for the costs of an appeal by the Cycle Corporation to the C. A., which he had leave to prosecute. The appeal succeeded, and thereupon the sum of 200*l.* was paid out to the receiver. Afterwards the House of Lords reversed the decision of

the C. A., and ordered the Corporation to pay the costs of the proceedings in the C. A. and in the H. L. The successful appellants then applied to the court for an order upon the receiver to pay the 200*l.* to them, contending that the court would compel the receiver, as an officer of the court, to do what was right and honourable. But the application was refused by Joyce, J., and by the C. A.

(*o*) [1904], 1 Ch. 819, 825.

duty to move for an attachment; and it is sufficient if he swears that he had the information from the tenants, and that he believes it (*p*). The interference of the owner of the inheritance with the rents does not exempt the receiver from being charged with the whole amount: in order to discharge himself he must show what the owner of the inheritance received, or hindered him from getting (*q*). Chap. VII.

Where a receiver appointed over the property of a company has entered into a contract to sell and the company is dissolved before the contract has been completely carried into effect, an order may be made vesting in the purchaser any legal interest which was in the company (*r*). Sale by receiver.

Where a sale is ordered in a debenture holders' action under R. S. C. Ord. LI. r. 1 (b), and there are debenture holders whose charge is subsequent to that of the series represented by the plaintiff, and some of whom are not parties to the action, the sale will be ordered to be made, not by the receiver simply, but with the approbation of the judge, so that all the debenture holders may be brought into chambers on the summons to approve a conditional contract (*s*).

The receiver appointed in an action ought not to interfere in any litigation between the parties to it. If he does, he will not be allowed the costs of a motion for such a purpose. It is the receiver's duty to receive and Duty of receiver not to interfere between the parties.

(*p*) *Anon.*, 2 Moll. 499.

(*q*) *Hamilton v. Lighton*, 2 Moll. 499.

(*r*) *Re R. Mills & Co., Ltd.*, W. N. 1905, 36; and see *Re 12 Cable Road*, W. N. 1904, 8; *Re General Accident Assurance Cor-*

poration [1904], 1 Ch. 147; *Re 9 Bomore Road* [1906], 1 Ch. 359, not following *Re Taylor's Agreement Trusts* [1904], 2 Ch. 737.

(*s*) *Re Crigglesstone Coal Co.* [1906], 1 Ch. 523.

Chap. VII. collect rents and other moneys without raising any controverted question between the parties (*t*).

Payment of interest to incumbrancers out of rents and profits.

Applications in respect of the estate should be made by persons beneficially entitled, not by the receiver.

Except under very special circumstances, the receiver of an estate ought, so far as the rents and profits will go, to pay them on account of the interest of the several incumbrancers in the order of their priority (*u*).

All applications to the court in respect of estates in the hands of a receiver should, as a general rule, be made on behalf of persons beneficially interested in the estate, and not by the receiver. The receiver ought not, generally, to present a petition, or originate any proceedings in the action (*x*). A receiver is a person appointed by the court to receive. There is no vesting of any cause of action in him (*y*). If, owing to any difficulty, an application to the court becomes necessary, the receiver should apply to the party conducting the proceedings, or, it is conceived, to any other party at whose instance he was appointed, to make the necessary application. If, after he has done so, no application is made, and no proper means are taken to relieve the receiver from his difficulty, he may himself apply and will be entitled to his costs (*z*). In a case in the Court of Chancery, where a receiver had incurred costs in the execution of his duties, and the

(*t*) *Comyn v. Smith*, 1 Hog. 81.

(*u*) *Re Kearney*, 25 L. R. Ir. 89.

(*x*) *Miller v. Elkins*, 3 L. J. Ch. 128; *Parker v. Dunn*, 8 Beav. 498; *Ex parte Cooper*, 6 Ch. D. 255. The receiver of the estate of a lunatic ought not to present a petition without the concurrence of the committee. *Re Earl of Kilkenny*, 7 Ir. Eq. 594. If the receiver of an estate proves without leave against the

estate of a bankrupt legatee, a debtor to the estate, he thereby discharges the debt, and entitles the legatee, on the annulment of his bankruptcy, to his legacy. *Armstrong v. Armstrong*, L. R. 12 Eq. 614.

(*y*) *Ex parte Sacker*, 22 Q. B. D. 185.

(*z*) *Ireland v. Eade*, 7 Beav. 55; *Parker v. Dunn*, 8 Beav. 498.

parties to the suit had for a long time neglected to provide for them, it was held that he was justified in presenting a petition for payment (*a*).

It must, however, be mentioned that, in several cases to be found in the books, receivers have even originated proceedings in their own names without any observations having been made as to the impropriety of that course (*b*).

That the receiver appointed in an action should be made a party to proceedings in it, is in some cases necessary. Thus, if the receiver pays money in his hands to the solicitors of the plaintiff, who are also his own solicitors, without any previous instructions as to the specific application of the money, it is to be considered to be paid to them as the solicitors (not of the plaintiff, but) of the receiver, and the receiver must be made a party to an application for payment into court of the money by the solicitors (*c*).

Where a party to an action is appointed receiver, he is entitled to apply to the court as freely as if he were not holding that office. "A party," said Lord Cottenham, in *Scott v. Platel* (*d*), "by being appointed receiver, does not thereby lose his privileges as a party

(*a*) *Ireland v. Eale*, 7 Beav. 55.

(*b*) See *Cronin v. McCarthy*, Fl. & K. 49; *Evelyn v. Lewis*, 3 Ha. 472; *Husey v. London Electric Supply Corporation* [1902], 1 Ch. at p. 412; also *Re Liskeard and Caradon Railway Co.* [1903], 2 Ch. 681, at p. 684, *supra*, p. 72. It was said in an Irish case that a receiver might file a bill to restrain waste if the case were urgent, without

waiting for an order for the purpose, but that if the case were not urgent, he ought to apply to the court. *Nangle v. Lord Fingal*, 1 Hog. 142.

(*c*) *Chater v. Maclean*, 1 Jur. N. S. 175; see, too, *Dixon v. Wilkinson*, 4 Drew. 614; 4 D. & J. 501; *Ind, Coope & Co. v. Kidd*, 63 L. J. Q. B. 726.

(*d*) 2 Ph. 229, at p. 230.

Chap. VII. to the cause; otherwise, by appointing a party receiver, you would paralyse the proceedings in the suit."

Duty of receiver of assets of a company as to preferential debts.

In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a limited company (*e*), secured by a floating charge, or in case possession is taken by or on behalf of such debenture holders, of any property comprised in or subject to such a charge, then and in either of such cases, if the company is not at the time in course of being wound up, the debts mentioned in section 209 (*f*) of the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), are required by section 107 (*g*) to be paid forthwith out of any assets coming to the hands of the receiver, in priority to any claim for principal or interest in respect of such debentures or debenture stock. But any payments made under the last-mentioned section are to be recouped, as far as may be, out of the assets of the company available for payment of general creditors.

In all cases where a receiver is appointed in a debenture holders' action, a direction is to be inserted in the order that the receiver do forthwith, out of any assets coming to his hands, pay the debts of the company which have priority over the claims of the debenture holders under the above Act; and that the receiver be allowed all such payments in his accounts (*h*).

A receiver appointed by debenture holders under a power contained in their debentures, who takes posses-

(*e*) These sections do not appear to apply to public companies, see s. 285.

(*f*) Replacing section 1 of the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62).

(*g*) Replacing section 3 of the Amendment Act, 1897 (60 & 61 Vict. c. 19).

(*h*) *Re Debenture holders' Actions*, W. N. 1900, 58; 16 T. L. R. 256; Seton, 7th ed., p. 735.

sion of the property charged by the debentures, takes possession "on behalf of" the debenture holders within the meaning of the above section 209, and section 107 accordingly applies to such a case (*i*).

The debts to which priority is given by section 209 are parochial or other local rates, taxes, wages or salary of any clerk or servant not exceeding 50*l.*, wages of any labourer or workman not exceeding 25*l.*, and sums due under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), not exceeding 100*l.* in any individual case, subject to the provisions of section 5 of the last-mentioned Act (*k*). The managing director of a company is not a "clerk or servant" within the meaning of the Act (*l*); nor is a secretary in respect of the salary of a clerk paid by him (*m*). But debts due to the following have been held entitled to priority; workmen paid by way of commission (*n*); commercial travellers paid by way of commission (*o*); an opera singer paid a certain sum for each performance (*p*); a chemist employed for definite hours on three days a week to produce certain formulæ, having other employment during remainder of the week (*q*).

In *Re Mannesmann Tube Co.* (*r*) the receiver appointed in an action by debenture holders, whose debentures took effect as a floating charge, had, shortly after the commencement of the winding up of the company, paid

(*i*) *Re Barnby's Limited*, W. N. T. L. R. 776.
1899, 103.

(*k*) See the provisions of section 209 for further details as to payments which are to be made.

(*l*) *Re Newspaper Proprietary Syndicate* [1900], 2 Ch. 349.

(*m*) *Cairney v. Back*, 22

(*n*) *Re Earle's Shipbuilding Co.*,
1 W. N. 1901, 78.

(*o*) *Re Klein*, 22 T. L. R. 664.

(*p*) *Re Winter German Opera*,
23 T. L. R. 662.

(*q*) *Re G. H. Morrison & Co. Ltd.*, 106 L. T. 731.

(*r*) [1901], 2 Ch. 93.

Chap. VII. poor rate and district rate, which were due from the company at the date of that commencement, and also water rate, which was payable according to meter and was not due until the water was supplied. It was held that the company's liquidators must repay to the receiver, out of the general assets of the company, the whole amounts of the poor and district rates, and so much of the water rate as was due at the date of the commencement of the winding up.

Duty of receivers appointed at instance of mortgagees of a business.

It is the duty of a receiver to preserve the property entrusted to him. If, therefore, mortgagees of a business obtain the appointment of a receiver over the actual assets of the business, apart from the goodwill, it is no part of the duty of such receiver to preserve the goodwill: he has to preserve the assets entrusted to him with a view to their most favourable realisation: he need not have regard to contracts entered into by the mortgagor (*s*). Where, however, the receiver is also appointed manager, the goodwill forms part of the property entrusted to his care, and he must, in order to preserve it, carry out contracts entered into by the mortgagor, unless authorised by the court to disregard them (*t*).

(*s*) See *Re Newdigate Colliery Co.* [1912], 1 Ch. 468.

(*t*) *Ib.* and see Chapter XIII.

CHAPTER VIII.

LIABILITIES OF A RECEIVER.

A RECEIVER is liable to account for all money coming Chap. VIII.
into his hands, in his capacity of receiver, at any time,
whether before or after the date of perfecting his security.
The principle, that the appointment is merely conditional
until his security is perfected, has no application where the
question is as to his own liability, or that of his sureties,
in respect of money received or expended by him (*a*).

A receiver is responsible for any loss occasioned to the Responsi-
bility for
losses.
estate over which he is appointed by reason of his wilful
default (*b*). If he places money received by him in what
he knows to be improper hands, he will have to answer
the loss out of his own pocket (*c*). A receiver, however,
is not expected, any more than a trustee or executor, to
take more care of property entrusted to him than he
would of his own (*d*). If he deposits money for safe
custody with a banker in good credit, to be placed to his
account as receiver, he will not be answerable for the
failure of the banker (*e*). The money must, however, be
deposited to the account of the receiver in that character,
or be otherwise earmarked. If a receiver pays money
which comes into his hands as receiver to his private

(*a*) *Smart v. Flood*, 49 L. T.
N. S. 467.

(*b*) *Skerrett's Minor*, 2 Hog.
192.

(*c*) *Knight v. Lord Plymouth*,
3 Atk. 480.

(*d*) 1 J. & W. 247, *per* Lord
Eldon. Comp. *White v. Baugh*,
9 Bligh, 198.

(*e*) *Knight v. Lord Plymouth*,
3 Atk. 480.

Chap. VIII. account with a banker, and not to a separate account as receiver, or otherwise mixes up the money which he collects as receiver with his own money, he will be liable for the loss if the banker fails (*f*).

Parting
with
control of
fund.

If a receiver puts a fund out of his own control so that other persons are able to deal with it, he guarantees the solvency of those persons, and becomes answerable for any loss that may ensue. It is immaterial that he may not have so far parted with the control as to enable another person to deal with it without his concurrence, if he has parted with his exclusive control, by associating with himself the authority of another person (*g*). A receiver, in whom the court confides, is not entitled to mix up with his delegated authority another person who is a total stranger to the court (*h*). Accordingly, in a case where the receiver, in order to obtain sureties, had agreed that the money to be collected from the property over which he was receiver should be handed over to a person who was the partner of one of the sureties, and should be deposited with bankers in the joint names of the sureties, and that all drafts upon the money so deposited should be written by the partner and signed by the receiver, it was held that the receiver was liable for the loss occasioned by the failure of the banking-house in which the money had been deposited (*i*). If, indeed, a receiver parts with his control over the fund, by introducing the control of an irresponsible person who is unknown to the court, it is conceived that he will be answerable for any loss which may happen to the

(*f*) *Wren v. Kirton*, 11 Ves.
381.

(*g*) *Salway v. Salway*, 2 R. &
M. 214.

(*h*) *Ib.* 219.

(*i*) *Ib.*: *S. C.* in H. L. nom.
White v. Bough, 9 Bligh, 181;
3 Cl. & Fin. 44.

fund which he has so dealt with, not only where some particular peril in which he has placed the fund can be shown to have been the cause of the loss, but generally where he has not conducted himself as a prudent person would have done (*k*).

In a case where a receiver had paid money to the plaintiff's solicitor, with directions to pay it into court, which had not been done, the receiver was held liable for the loss, there being no sufficient evidence to show that the receiver had authority from the plaintiff to pay the money to the solicitor (*l*). And where a receiver appointed by way of equitable execution pays money to the judgment creditor's solicitor instead of to the creditor himself, he will be liable if the money never comes to the creditor's hands (*m*).

A sum of money due from a receiver, whether the amount has been ascertained or not, is, as long as the recognizance exists, a debt of record (*n*).

If a receiver is in default for not passing his accounts and paying his balances within the proper time, or if, not being in default, he derives a benefit by accepting interest on the balances which are from time to time in the hands of his banker, he is liable to make good any loss which may be occasioned by the bankruptcy of the banker, although the moneys may have been deposited to a separate account (*o*).

(*k*) *Salway v. Salway*, 2 R. & M. 220.

(*n*) *Seagram v. Tuck*, 18 Ch. D. 296.

(*l*) *Delfosse v. Crawshay*, 4 L. J. Ch. N. S. 32; see, too, *Dixon v. Wilkinson*, 4 Drew. 614; 4 D. & J. 508.

(*o*) *Drever v. Maudsley*, 13 L. J. 433; 8 Jur. 547; 3 L. T. 157; see, too, *Shaw v. Rhodes*, 2 Russ. 539; *Wilkinson v. Bewick*, 4 Jur. N. S. 1010.

(*m*) *Inl, Coope & Co. v. Kild*, 63 L. J. Q. B. 726.

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A person who, having improperly assumed the character, neglects the duties of a receiver, while the parties interested consider him to be acting as receiver, makes himself responsible for any property which is lost through his neglect (*p*). If a solicitor in an action assumes the character of a receiver, and rents are paid to him in that character, he will be ordered to pay them over to the real receiver, and can claim no lien upon them, either by virtue of an agreement with a party to the action or for costs (*q*).

If a receiver has paid money to a wrong person, and is afterwards obliged to pay the amount into court, and after due application thereof a surplus remains, the court will not pay over such surplus to the person to whom the former payment was wrongfully made without satisfying the receiver's demands (*r*). If, however, the wrongful payment is made by the receiver's agent, the receiver cannot have the benefit of the payment against the surplus, except subject to any liability of the agent to the person to whom the wrongful payment was made; and the accounts cannot be opened between those persons on application by the executor of the receiver, praying for repayment from the person wrongfully paid, or, in default of such repayment, out of the rents of the estate over which the receiver was appointed (*s*).

Where a receiver appointed by debenture holders had paid into court, to a separate account in his name, money received under a contract, it was held that he came within the category of agents who have handed over

(*p*) *Wood v. Wood*, 4 Russ.
558.

(*r*) *Gurden v. Badcock*, 6 Beav.
162.

(*q*) *Wickens v. Townsend*, 1 R.
& M. 361.

(*s*) *Ib.* 157.

money to their principals and that he was therefore not Chap. VIII. liable to judgment for breach of contract (*t*).

A receiver appointed over an estate by a colonial court is liable to be sued by the persons to whom the produce of the estate has been directed to be paid for an account of that produce; and the consignees of the produce, to whom express directions have been given for its application, are also liable to be sued, on the allegation that they are colluding with the receiver for the purpose of satisfying the claim against him out of money in their hands received from the estate and due to the plaintiff (*u*).

In one case, upon motion on behalf of a late ward of court, charging that certain accounts formerly passed were such as ought not to bind the applicant and stating errors and neglect, the receiver was ordered to account again from the beginning (*x*).

A receiver may be ordered personally to pay costs incurred by reason of his misconduct or neglect in the discharge of his duties (*y*). He will not, however, be held personally responsible if he has honestly done his best and failed. If a receiver has not succeeded in getting in rents, it is his first duty to lay the state of affairs before the court, and to ask for guidance, under circumstances where the incumbrancers on the property can consult and advise with him as to the best course to be pursued for their common interests (*z*).

A person who owes money, come to his hands as Attach-
ment of
receiver

- (*t*) *Bissell v. Ariel Motors, Ltd.*, Moll. 545.
27 T. L. R. 73. (*y*) *Ex parte Brown*, 36 W. R.
(*u*) *Fitzgerald v. Stewart*, 2 303.
Sim. 333. (*z*) *Re St. George's Estate*, 19
(*v*) *Wilddridge v. McKane*, 2 L. R. Ir. 566.

Chap. VIII. receiver, is in a fiduciary capacity within the meaning of
 under the the third exception to s. 4 of the Debtors Act, 1869.
 Debtors He is liable to attachment for breach of an order to pay
 Act. such money, made after he has been discharged from being
 receiver. The mere fact that a defaulting receiver is
 unable to pay is not sufficient to induce the court to
 exercise the discretion given by the Debtors Act, 1869,
 Amendment Act, 1878, and to refuse leave to issue an
 attachment (a).

Liabilities
 of receiver
 to third
 parties for
 misconduct
 in the
 exercise of
 his duties.

Although the court will not allow the possession of its
 receiver to be disturbed without its leave (b), it will in its
 discretion, if the misconduct of the receiver becomes the
 subject of proceedings in another court, either itself take
 cognisance of the complaint, or leave the matter to be
 dealt with in the other proceedings. There is a clear
 and well-recognised distinction between cases where the
 jurisdiction of the court, or the validity or propriety of
 its orders or process, is disputed, and cases where the
 authority of the court is admitted, but redress is sought
 against its officer for irregularity or excess in the per-
 formance of its orders. In the former case the court has
 no choice, but must draw the whole matter over to its
 own cognisance. In the latter case, the court has an
 indisputable right to assume the exclusive jurisdiction;
 but it may, if it thinks fit, on the circumstances being
 specially brought before it, permit another court to
 proceed for punishment or redress (c).

Disabilities
 of receiver.

A receiver will not be given leave to bid at a sale by
 the court of the property subject to the receivership (d),

(a) *Re Gent*, 40 Ch. D. 190. 1 Keen, 749.

(b) *Supra*, p. 196.

(c) *Aston v. Heron*, 2 M. & K. 196.

(d) *Alven v. Bond*, 1 Fl. & K.

396; see, too, *Chalie v. Pickering*,

and he cannot, without the special leave of the court, purchase either directly, or indirectly in the name of a trustee for himself, any property or interest in property over which he is receiver, whether the sale is made under an order of the court (*e*), or by a mortgagee selling outside the action (*f*). A receiver is a trustee for the parties interested of any money due from him as receiver and not accounted for by him, and he cannot, as against them, avail himself of any Statute of Limitations, even when his final accounts have been passed and the recognizance vacated (*g*). It is conceived that the law on this point has not been altered by s. 8 of the Trustee Act, 1888 (*h*).

A receiver appointed by the court is an officer of the court: he is therefore not an agent for any person, but a principal, and as such personally liable to all persons dealing with him, subject to a correlative right to be indemnified out of the assets in respect of all liabilities properly incurred (*i*). He is entitled to this indemnity in priority even to the claims of persons who have advanced money under an order making the repayment of the advance a first charge on all the assets (*k*), and in priority to the costs of the action (*l*), and subject only to

Personal liability and right to indemnity of receivers.

(*e*) *Alven v. Bond*, 1 Fl. & K. 196; *Nugent v. Nugent* [1908], 1 Ch. 546.

(*f*) *Nugent v. Nugent* [1908], 1 Ch. 546.

(*g*) *Seagram v. Tuck*, 18 Ch. D. 296.

(*h*) *Re Cornish* [1896], 1 Q. B. 99, 104.

(*i*) *Burt, Boulton & Hayward v. Bull* [1895], 1 Q. B. 276; *Re Glasdir Copper Mines* [1906], 1 Ch. 365; *Re A. Boynton, Ltd.*

[1910], 1 Ch. 519; *Moss Steamship Co. v. Whinney*, per Lord Mersey [1912], A. C. p. 271; and see *Ex parte Izard*, 23 Ch. D. 75, 79; *Re Brooke* [1894], 2 Ch. 600.

(*k*) *Strapp v. Ball, Sons & Co.* [1895], 2 Ch. 1; *Re Glasdir Copper Mines* [1906], 1 Ch. 365; *Re A. Boynton, Ltd.* [1910], 1 Ch. 519.

(*l*) *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317.

Chap. VIII. the plaintiff's costs of realisation (*m*). Questions as to a receiver's liability and right to indemnity occur most frequently where he is also appointed manager and are dealt with fully in Chapter XIII.

A receiver appointed by the court at the instance of debenture holders or mortgagees of a company is not personally liable in respect of breaches of contracts which were entered into by the company before his appointment (*n*); nor is a receiver personally liable for rent due under any lease or agreement for tenancy made by a company or other mortgagor before his appointment, although he enters and occupies the premises (*o*); nor does payment by him of an instalment of rent estop him from denying that he is tenant for the remainder of the term (*p*).

The owner made liable by section 4 of the Water Companies (Regulation of Powers) Act, 1887 (50 & 51 Vict. c. 21), does not include a constructive owner such as a receiver (*q*), and the person liable under section 72 of the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), is the person who actually collects the rents; consequently, where a mortgagor had appointed a collector who paid them first to the mortgagor and afterwards to a receiver, the collector and not the receiver was held liable to pay the water rate (*r*).

(*m*) See *Re London United Breweries* [1907], 2 Ch. 511; and *Ramsay v. Simpson*, 1899, 1 Ir. R. 194.

(*n*) See *Re Newdigate Colliery Co.*, [1912], 1 Ch. 468.

(*o*) *Hay v. Swedish Railway Co.*, 8 T. L. R. 775: if the receiver continues to occupy after the determination of the

tenancy he may become personally liable under an express or implied new tenancy.

(*p*) *Justice v. James*, 15 T. L. R. 181.

(*q*) *Metropolitan Water Board v. Brooks* [1911], 1 K. B. pp. 292, 293.

(*r*) *Metropolitan Water Board v. Brooks* [1911], 1 K. B. 289.

CHAPTER IX.

SALARY AND ALLOWANCES OF A RECEIVER.

A RECEIVER will, unless it is otherwise ordered, or Chap. IX. unless he consents to act without a salary, be allowed a proper salary, or have allowances made to him for his care and pains in the execution of his duties (*a*). And, even where he has consented to act without a salary, he will be entitled to be paid for services which have proved beneficial to the estate, and which it was no part of his duty to perform, *e.g.*, working as a mechanic in a business of which he has, by the order appointing him, been constituted manager (*b*). Where the order appointing a receiver says nothing about remuneration, this does not amount to a decision that he is to have no remuneration, even though he be a trustee, who as a general rule receives no remuneration (*c*). The amount of a receiver's salary or allowance is usually not fixed until the passing of his first account, when he will be allowed either a percentage upon his receipts, or a gross sum by way of salary (*d*).

Under very special circumstances an order has been made that the receiver be allowed such salary as the judge may, on the passing of each account, think reasonable (*e*).

(*a*) R. S. C. Ord. L. r. 16. As to receivers in lunacy, see Rules in Lunacy, 1892, r. 83.

(*b*) *Harris v. Sleep* [1897], 2 Ch. 80.

(*c*) *Re Bignell, Bignell v. Chapman* [1892], 1 Ch. 59.

(*d*) Dan. Ch. Pr. 7th ed. 1441. See further, as to practice, *per* Byrne, J., in *Silkstone, &c., Coal Co. v. Edey* [1901], 2 Ch. at p. 655.

(*e*) *Neave v. Douglas*, 26 L. J. Ch. 756.

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Where the court appoints a receiver with a salary, it is incumbent upon him to pay out of his own pocket any expenses which he may incur in giving security, either by a bond with sureties, or by means of a guarantee society. But, if he is appointed without salary, he will be allowed in his accounts expenses reasonably incurred by him for that purpose (*f*).

Amount of
allowance.

There is no settled scale governing the allowance to a receiver. According to a rule laid down by Lord Langdale in *Day v. Croft* (*g*), the allowance to a receiver of the rents and profits of a freehold or leasehold estate, was, at that time, generally 5 per cent. on the amount received. That allowance might, however, be increased if there was any special difficulty in the collection; or it might be diminished; or a fixed salary might be allowed where the rental was considerable (*h*).

The rule laid down by Lord Langdale in *Day v. Croft* no longer exists. At the present day 3 per cent. on the amount received is usually allowed to a receiver. In cases of difficulty, however, 5 per cent. may be allowed. In very rare cases 10 per cent. has been allowed. In the case of a manager there is no scale of remuneration; each case must be decided on its merits (*i*). A receiver and manager appointed by partners to wind up a business is, in the absence of express stipulation, entitled to a *quantum meruit*, but not to remuneration in accordance with the provisions regulating the remuneration of the official receiver and liquidator of a company in liquidation (*k*).

- | | |
|---|---|
| (<i>f</i>) <i>Harris v. Sleep</i> [1897], 2 Ch. 80. | Ch. Pr. 7th ed, p. 1441. |
| (<i>g</i>) 2 Beav. 491. | (<i>i</i>) <i>Prior v. Bagster</i> , W. N. 1887, 194; 57 L. T. 761. |
| (<i>h</i>) Seton, 7th ed, p. 739; Dan. | (<i>k</i>) <i>Ib</i> . |

A receiver is entitled to have out of the funds collected or realised by him his costs, charges, and expenses properly incurred in the discharge of his ordinary duties, or in the performance of extraordinary services which have been sanctioned by the court (*l*). Where a receiver has paid sums out of his own pocket in satisfaction of legacies, he will be reimbursed (*m*). And similarly, in a suit to administer a West Indian estate, a consignee appointed by the court, who had become in advance to the estate, was held entitled to repayment out of the *corpus* of the estate, in priority to the costs of the suit (*n*).

Costs,
charges,
and ex-
penses.

It is not generally necessary for a receiver to apply to the court for the payment of his costs, charges, and expenses properly incurred in the discharge of his duties (*o*).

The payment of the costs, charges, and expenses, including his remuneration (*p*), of a receiver appointed over an estate is not dependent on the sufficiency of the estate to bear all the costs. He is entitled to be paid without regard to the sufficiency of the estate to meet the claims upon it. Thus a receiver appointed over the assets of a company is entitled to be paid next after payment of the costs of realisation (*q*), and even in priority

(*l*) *Malcolm v. O'Callaghan*, 3 M. & C. 52; and see *supra*, p. 235. In bankruptcy a receiver is entitled to his costs next after the costs of realising the estate. *Ex parte Royle*, 23 W. R. 908. As to costs of receiverships in the King's Bench Division, see 34 Sol. J. 74, 90.

(*m*) *Palmer v. Wright*, 10 Beav. 236.

(*n*) *Morison v. Morison*, 7 D. M. & G. 215.

(*o*) *Fitzgerald v. Fitzgerald*, 5 Ir. Eq. 525.

(*p*) *Re Glasdir Copper Mines* [1906], 1 Ch. 365.

(*q*) *Batten v. Wedgwood, &c.*, Co., 28 Ch. D. 323; *Re London United Breweries* [1907], 2 Ch. 511. The plaintiff is entitled to his costs as between solicitor

Chap. IX. to persons advancing money under an order of the court on the terms that repayment is to be a first charge on the assets (*r*). His claim is, however, limited to the amount of the assets. A receiver and manager appointed in a partnership action has, therefore, no claim against the partners personally, if the assets are insufficient to discharge the whole of the amount due to him, although he may have been appointed under a consent order (*s*). Where a partner has been appointed receiver, he is entitled to be paid in full (including his remuneration), although he is indebted to the partnership and unable to pay (*t*).

A receiver appointed over mortgaged property, who goes into possession, and receives the rents of the property with the knowledge of the mortgagee, is entitled to deduct his remuneration and expenses before paying over to the mortgagee the balance of rents in his hands (*u*).

When the court gives a receiver authority to advance money for the benefit of the estate of which he is receiver, it generally allows him interest at 5 per cent. on the sum which it authorises him to advance, and gives him a charge on the assets for that sum and interest (*x*). If a receiver advances money without such previous authority, he is entitled only to an indemnity out of the assets (*y*).

and client, if the estate is deficient for payment of the debentures in full: see *Re A. Boynton, Ltd.* [1910], 1 Ch. 519. (*r*) *Strapp v. Ball, Sons & Co.* [1895], 2 Ch. 1; *Re Glasdir Copper Mines* [1906], 1 Ch. 365; *Re A. Boynton, Ltd.* [1910], 1 Ch. 519.

(*s*) *Boehm v. Goodall* [1911], 1 Ch. 155.

(*t*) *Davy v. Scarth* [1906], 1 Ch. 55.

(*u*) *Davy v. Price*, W.N. 1883, 226.

(*x*) *Ex parte Izard*, 23 Ch. D. 80.

(*y*) *Ib.*

A receiver has not such a vested right to the collection of money payable in respect of the estate over which he is receiver as to be entitled to prevent such money from being paid into court without passing through his hands, where poundage may be saved by a direct payment into court. Lord Langdale accordingly, in *Haigh v. Grattan* (z), made an order, on the petition of some of the parties interested, that a debtor, who was willing to pay the amount of his debt to the Accountant-General at once, should be at liberty to do so (a).

A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense he may have been put to in the performance of his duties (b), or in bringing actions, or in defending legal proceedings which have been brought against him (c). Where, for example, an adverse application had been made against a receiver by a party to the cause, and had been refused with costs, the applicant being wholly unable to pay those costs, it was held that the receiver was entitled to be indemnified, and to have his costs as between solicitor and client out of a fund in hand, although it belonged to incumbrancers (d). So, also, where a Chancery receiver defended an action at law, and the defence was completely successful, his extra expenses were allowed, although he had acted without the leave of the

Extra-ordinary expenses.

(z) 1 Beav. 201.

(a) See, too, *Weale v. Ireland*, 5 Jur. 405; and, as to the practice in lunacy, *Ex parte Clayton*, 1 Russ. 476; *Ex parte Cranmer*, ib. 477, n.

(b) *Potts v. Leighton*, 15 Ves. 276.

(c) *Bristowe v. Needham*, 2 Ph. 190; *Re W. C. Horne & Sons, Ltd.*

[1906], 1 Ch. 271. Distinguished *Re Dunn* [1904], 1 Ch. 648, *infra*, p. 263. The receiver should not wait to apply for leave to defend an action until just before trial. *Anon.*, 6 Ves. 286.

(d) *Courand v. Hammer*, 9 Beav. 3. Distinguish *Re Dunn*, *ubi supra*.

Chap. IX. Chancery court (*e*). Again where one of two partners in a business of agricultural implement makers, being the defendant in an action for dissolution of the partnership, had been appointed receiver and manager of the business without salary, he was allowed in his accounts 2*l.* a week, as wages, for a period of 18 months during which he had worked as a common workman in the business of which he was receiver. The Court of Appeal, however, pointed out that, in not asking for the wages at the time of his appointment, he had committed a technical irregularity, and had run a great risk of not getting any remuneration for his extraordinary services (*f*). The costs of litigation undertaken with the permission of the court to preserve the assets are part of the receiver's costs of administration and ought to be included in his accounts (*g*).

If any extraordinary expenses have been incurred by the receiver, allowances for them will not generally be sanctioned, unless they have been incurred with the approbation of the court or judge (*h*), or unless the estate has been benefited thereby (*i*). Accordingly, where a receiver, without the leave of the court, defended an action arising out of a distress for rent made by him, and compromised it on the terms of the plaintiff abandoning it and each party bearing his own costs, he was not

(*e*) *Bristowe v. Needham*, 2 Ph. 189; *Ex parte Izard*, 23 Ch. D. 190. As to allowances to a

(*f*) *Harris v. Sleep* [1897], 2 Ch. 80, at pp. 84, 85. receiver and manager in respect of liabilities incurred by him, see

(*g*) *Re W. C. Horne & Sons, Ltd.* p. 313.

[1906], 1 Ch. 271: these costs had been omitted from the receiver's accounts and the solicitor was granted a charging order. (*i*) *Bristowe v. Needham*, 2 Ph. 190; *Malcolm v. O'Callaghan*, 3 M. & C. 58; and see *Viola v. Anglo-American Cold Storage Co.* [1912], 2 Ch. at p. 311.

(*h*) *Re Ormsby*, 1 Ba. & Be.

allowed his costs (*k*). So, where the receiver of a lunatic's estate instituted proceedings in a wrong form, which proceedings he abandoned, and then adopted a form of action in which he succeeded, he was refused the costs of the abandoned proceedings, although the Master reported that he had acted *bonâ fide* (*l*).

A receiver appointed and acting in proceedings for the administration of an estate is not entitled to indemnity in respect of the costs of defending a purely personal action against him, having no relation to the estate except so far as the acts complained of were done by him while acting as an officer of the court. No benefit to the estate can result from his defending such an action (*m*).

The receiver of an estate is not entitled to be reimbursed the expenses of journeys to and residence in a foreign country, for the purpose of prosecuting proceedings before the tribunals of that country for the recovery of property belonging to the estate, unless he has the express sanction and authority of the court for such journeys and residence (*n*). If, however, such proceedings are successful, and it appears that the success has been due to, or has arisen from, the presence of the receiver, the court may consider it inequitable for the parties to take the benefit of the receiver's exertions without defraying the expenses which have attended them, although no previous authority for incurring them was given (*o*). The fact that some of the parties

(*k*) *Swaby v. Dickon*, 5 Sim. 648, at pp. 655, 657.

629. (*n*) *Malcolm v. O'Callaghan*, 3

(*l*) *Re Montgomery*, 1 Moll. M. & C. 52.

419. (*o*) *Malcolm v. O'Callaghan*, 3

(*m*) *Re Dunn* [1904], 1 Ch. M. & C. at p. 58.

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interested in the estate may have given the receiver authority furnishes no ground for the allowance by the court of his expenses out of the estate (*p*).

If the property in dispute is small, the court may appoint a receiver without a percentage (*q*).

Trustee
receiver.

If a trustee (*r*), or party interested, asks leave to propose himself as receiver he will usually be required, if appointed, to act without salary (*s*). In a case, however, where a testator had appointed as trustee and executor a person who for many years had been the paid receiver and manager of his estate, the court appointed him as receiver at a salary, the tenant for life being an infant (*t*). For there is no inflexible rule that a trustee can only be appointed receiver on the terms of his having no remuneration (*u*).

Where a receiver in an action is served with a petition in it, which makes no personal charge against him, he should not appear, and will get no costs of appearance if he does (*x*). But in a case under the old practice, in which a receiver had incurred costs which the parties had long neglected to provide for, he was allowed to petition for the payment of them (*y*).

(*p*) *Malcolm v. O'Callaghan*, 3 M. & C. at p. 61.

(*q*) *Marr v. Littlewood*, 2 M. & C. 458.

(*r*) *Sykes v. Hastings*, 11 Ves. 363; *Pilkington v. Baker*, 24 W. R. 234; *supra*, p. 138.

(*s*) Seton, 7th ed. pp. 729, 740; *supra*, pp. 138, 139.

(*t*) *Newport v. Burg*, 23 Beav. 30.

(*u*) *Re Bignell, Bignell v. Chapman* [1892], 1 Ch. 59.

(*r*) *Herman v. Dunbar*, 23 Beav. 312. The statement in the text applies, it is conceived, *mutatis mutandis*, to motions and summonses. In *General Share Co. v. Wetley Brick Co.*, 20 Ch. D. 260, 267, an applicant who had improperly served the receiver was ordered to pay his costs of appearance, but the circumstances were peculiar.

(*y*) *Ireland v. Eade*, 7 Beav. 55; *supra*, p. 244.

If a receiver suffers any costs to accrue which ought to have been prevented, he may have to pay them out of his own pocket (*z*).

The costs of drawing out a scheme of an estate over which a receiver has been appointed, and of the holdings of the tenants, are chargeable, if at all, as part of the receiver's costs, and not of the solicitor's; but it is not certain, to say the least, that any allowance will be made to the receiver for such an item where he is paid by a percentage, though it may be necessary for the due performance of his duties (*a*).

If the exertions of a receiver of an estate have been successful in creating a benefit for the estate, an allowance will be made to him for the costs to which he has been put (*b*), but no costs will be allowed of an unsuccessful defence conducted without the leave of the court (*c*), or of proceedings improperly taken and abandoned, although the receiver may have acted *bond fide* and have succeeded in subsequent proceedings (*d*).

In a case in which a receiver appointed by the Court of Chancery was directed by the order appointing him to make a specified payment to a party to the suit, but, instead of doing so, he, without the leave of the court, paid the money to judgment creditors of that party, pursuant to a garnishee order obtained by the creditors in their action, the creditors were ordered, on motion in the suit by the party aggrieved, to repay the money so paid

(*z*) *Cook v. Sharman*, 8 Ir. Eq. 515. As to costs which will or will not be allowed to a receiver in London, see *Sadlier v. Greene*, 2 Ir. Ch. 330.

(*a*) See *Re Catlin*, 18 Beav. 511.

(*b*) *Bristowe v. Needham*, 2 Ph. 190; *supra*, pp. 235, 244.

(*c*) *Swaby v. Dickon*, 5 Sim. 681; *supra*, pp. 235, 263.

(*d*) *Re Montgomery*, 1 Moll. 419.

Chap. IX. to them, and a direction was also given that, in default of such repayment, the amount should be disallowed to the receiver on the passing of his account. And the receiver, as well as the creditors, was held liable to pay the costs of the motion (*e*).

The receiver of an estate may be held entitled to an allowance for money laid out on the estate without previous order, on its being ascertained that the expenditure has been beneficial to the estate (*f*).

In a case where the receiver's default in bringing in his accounts on the appointed days was known to the parties, and the accounts had been passed and poundage allowed without objection, no loss having been sustained by the receiver's fault, and no balance being due from him, the court would not afterwards listen to an application to strike out his allowance of poundage and costs at the instance of the parties who had the benefit of his services (*g*); but the amount of the allowance made to a receiver may be reconsidered, where, though an objection was originally made to it, the particular circumstances of the case and the nature of the items were not taken into consideration (*h*).

A receiver has no vested interest in his appointment. He is not entitled to litigate for the profit of the receivership. His only interest is in respect of his percentage (*i*).

Receiver
may not
make
interest on
balances
in hand.

A receiver, who passes his accounts and pays his balances regularly, is not entitled on that ground to make interest for his own benefit, out of moneys which

(*e*) *De Winton v. Mayor, &c.*,
of Brecon, 28 Beav. 204.

(*h*) *Day v. Croft*, 2 Beav. 488.

(*f*) See pp. 236, 237.

(*i*) *Ex parte Cooper*, 6 Ch. D.
255.

(*g*) *Ward v. Swift*, 8 Ha. 139.

come into his hands, in his character of receiver, during the intervals between the times of passing his accounts (*k*). Chap. IX.

If it is necessary, not from the conduct of the parties, but owing to the condition of the estate, to have a receiver appointed over the estate of a tenant for life of real estate, it is an expense to which the estate for life is inherently subject. In such a case it is the right of the remainderman to have a receiver appointed, and to have the ordinary expenses incidental to the appointment paid out of the life estate (*l*). Life estate subject to expenses of receiver.

The authority of a receiver in lunacy expires with the death of the patient; he will not be given credit in his accounts for sums paid, nor is he nor are his sureties chargeable in the lunacy for sums received, after that date (*m*). Receiver in lunacy.

(*k*) *Shaw v. Rhodes*, 2 Russ. 539; see, too, *Earl of Lonsdale v. Church*, 3 Bro. C. C. 40. (*m*) *Re Walker* [1907], 2 Ch. 120. The receiver would, it is suggested, be liable as executor *de son tort*.

(*l*) *Shore v. Shore*, 4 Drew. 510.

CHAPTER X.

ACCOUNTS.

Chap. X. UNDER the old practice the accounts of a receiver
Delivery of appointed by the court were required to be delivered
accounts. annually (*a*); but under the present practice the judge, to whose chambers the action is attached, may, at his discretion, fix a longer or shorter period for a receiver to leave and pass his accounts, and also the days on which the receiver shall pay the balances appearing due on the account or such part thereof as shall be certified as proper to be paid by him (*b*). The accounts must be delivered at the judge's chambers on or before the days appointed for the purpose (*c*).

Where the receiver is appointed in an action in the Chancery Division commenced in a district registry, other than the Manchester or Liverpool Registry, the registrars of which have all the powers of a Chief Clerk in the Chancery Division (*d*), the accounts are taken in London, unless the order—as it may do (*e*)—directs the proceeding to take place in the registry. In King's

(*a*) See Beames' Ch. Ord. 463.

(*b*) R. S. C. Ord. L. 18. Where the expenses of attending and passing a receiver's accounts are large, the court will direct the accounts to be passed once a year only. *Day v. Croft*, 20 L. J. Ch. 423.

(*c*) This was so under the old

practice also. See Bloxam on Regulations to be Observed in the Conduct of Business at Chambers, published in the year 1857; see, too, Dan. Ch. Pr. 7th ed. p. 1446.

(*d*) See R. S. C. Ord. XXXV. r. 6A.

(*e*) *Re Capper*, 26 W. R. 434.

Bench actions proceeding in a district registry the account is passed in the registry. Chap. X.

The accounts should be made out in the form prescribed by the Rules of the Supreme Court, with such variations as circumstances may require (*f*). In the first account which he passes, the receiver of an estate should state, in the column for observations, how each tenant holds, and every alteration should be noticed in the subsequent accounts. In this column also should be entered any remarks the receiver may think proper to make as to arrears of rent, state of repair, or otherwise (*g*). If the account is drawn up in an irregular manner, the receiver may be ordered to draw it up in a proper form, and to pay the costs occasioned by his irregularity (*h*). Form of accounts.

It is the receiver's duty to make out his account and to verify it by affidavit. The items on each side of the account ought to be numbered consecutively, and the account to be referred to by the affidavit as an exhibit (*i*). The affidavit of the receiver verifying his account should be in the form No. 22 in Appendix L. to the Rules of the Supreme Court (*k*). Account to be verified by affidavit.

The receiver leaves his account in the chambers of Leaving account in chambers.

(*f*) R. S. C. Ord. L. 19, and Appendix L., No. 14; see, too, Dan. Ch. Forms, 5th ed. As to receiver's accounts in the K. B. D., see Central Office Regulations, set out in Annual Practice nn. to R. S. C. Ord. L. r. 16. As to receiver's accounts in lunacy, see Rules in Lunacy, 1892, r. 89.

(*g*) Bloxam, 51; Dan. Ch. Pr. 7th ed. p. 1446. If moneys have been paid to the receiver

under protest, he ought by affidavit to distinguish them from the rest. *Brownhead v. Smith*, 1 Jur. 237.

(*h*) Dan. Ch. Pr. 7th ed. p. 1447; see, too, *Bertie v. Lord Abingdon*, 8 Beav. 53, 60.

(*i*) R. S. C. Ord. XXXIII. r. 4.

(*k*) R. S. C. Ord. L. r. 22; see, too, Dan. Ch. Forms, 5th ed.

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the judge to whom the action or matter is assigned, together with an affidavit verifying the account in the form No. 22 in the above Appendix L., with such variations as circumstances may require. An appointment is thereupon obtained by the plaintiff, or person having the conduct of the action or matter, for the purpose of passing the account (*l*).

Passing
accounts.

Notice of the appointment having been obtained for the purpose of passing the account ought to be served upon the solicitors of such parties as are entitled to attend the passing of the accounts (*m*).

Under the old practice, where no directions on the subject had been given at the hearing of a cause, the court would not, on a subsequent application by petition, make an order to restrain parties entitled to attend the passing of the accounts from attending, although the result of such an order might have been a very large saving to the estate. In such a case persons interested in the residue were entitled to attend the subsequent proceedings at the cost of the estate, and the court could not order that they should attend at their own expense, and that it should be unnecessary to serve them (*n*). But under the present practice such a waste of money can be, and commonly is, prevented by means of a classification order (*o*).

(*l*) R. S. C. Ord. L. r. 20. On leaving the first account, a copy of the order appointing the receiver, certified by the solicitor to be a true copy thereof, must be lodged at chambers, if that has not previously been done. Dan. Ch. Pr. 7th ed. p. 1447, note (*x*).

(*m*) As to form of notice of appointment to proceed on an account, see Dan. Ch. Forms, 5th ed.

(*n*) *Day v. Croft*, 14 Beav. 29, at pp. 31, 32; 20 L. J. Ch. 423.

(*o*) See R. S. C. Ord. LV. r. 40; and cf. Ord. XVI. rr. 9, 32.

At the time appointed for passing the account, the receiver's solicitor attends with the vouchers like any other accounting party, and the account is gone through before the junior clerk in the chambers of the judge. Any disputed items will be disposed of by the Master at an appointment obtained before him for the purpose. Any person, who seeks to charge the receiver beyond the amount of which he has admitted the receipt, should give him notice of his intention, stating, as far as he can, the amount sought to be charged and the particulars thereof in a short and succinct manner (*p*).

The receiver, upon passing his account, brings in also his bill of costs. The bill is then taxed, and the amount included in his disbursements. On passing his first account the receiver's costs of completing his appointment are taxed and allowed (*q*). Parties attending the passing of a receiver's accounts have costs from the receiver only after a judgment or order disposing of the costs of the action, and showing who are or is entitled to costs out of the rents: in other cases the costs of the parties are costs in the action. Where the parties are entitled to have their costs paid by the receiver, such costs are taxed at chambers, and paid by the receiver and included in his account (*r*).

(*p*) R. S. C. Ord. XXXIII. r. 5.

(*q*) Dan. Ch. Pr. 7th ed. p. 1447, note (*a*).

(*r*) Dan. Ch. Pr. 7th ed. p. 1447, referring to Bloxam on Regulations to be Observed in the Conduct of Business at Chambers in Chancery, published in 1857. As to the scale

of such costs, see Ord. as to Supreme Court Fees, 1884, Sched. 72. The percentage is to be taken on the amount found to have been received on any periodical account (*Re Crawshaw*, 39 Ch. D. 552), including money borrowed by the receiver; see nn. to Fee No. 72 in Annual Practice.

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In a case in which an order referred it to the taxing master to tax the plaintiff's costs of an action, including the costs and remuneration of the receivers and managers appointed in the action, and to certify the balance after making a certain deduction, it was held that the taxing master had not power to make a separate certificate for the costs alone (*s*).

If a receiver includes in his bill of costs charges for work done in another capacity, which he allows the taxing master to deal with and strike out without objection, he cannot afterwards recover the amount of the sums so struck out in an action brought for that purpose (*t*).

The receiver is usually directed to hand copies of his accounts to such of the parties as are entitled to attend upon the passing thereof, and to charge for the same in his costs (*u*). But a plaintiff or a defendant entitled to attend the passing of a receiver's account is not allowed, in the taxation of the receiver's costs, a second copy of the account, if his solicitor is also the solicitor for the receiver, and has a copy in that capacity (*x*).

Allowance
of accounts.

The verified account, with a summary at the foot and a memorandum of allowance thereof, is signed by the Master. If any sums are disallowed, they are shown in the summary as deductions. The old practice, under which the account was entered in "the receiver's book," was cumbersome and expensive, and is obsolete.

(*s*) *Silkstone, &c., Coal Co. v. Eley* [1901], 2 Ch. 652.

(*t*) *Terry v. Dubois*, 32 W. R. 415.

(*u*) Dan. Ch. Pr. 7th ed. p. 1447.

(*x*) *Sharp v. Wright*, L. R. 1 Eq. 634. See the observations

of Kindersley, V.-C., as to the impropriety of the same solicitor acting for the receiver and for the party conducting the proceedings, in *Dixon v. Wilkinson*, 4 Drew. 619; and see *Bloomer v. Curie*, 51 S. J. 277.

After the allowance of the account, a certificate of the allowance, stating the balance due from the receiver and the day on which it is to be paid into court, is made and signed by the Master, and, upon being so signed, is transmitted by the Master to the Central Office, to be there filed, and is thereupon binding on all the parties to the proceedings, unless discharged or varied upon application by summons, to be made before the expiration of two clear days after the filing thereof (*y*).

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Certificate
of allow-
ance.

An order of the court appointing a receiver usually directs payment into court without a schedule to the order. A lodgment schedule is left in chambers and signed by the Master, and is forwarded by him to the Paymaster's Office (*z*). The lodgment schedule signed by the Master operates in the same manner as a lodgment schedule annexed to an order (*a*).

Receiver
must pay
in moneys.

Although a receiver is only bound by his recognizance to pass his accounts at the periods appointed by the judge, he may at any time apply to the court to pay in money in his hands; and if, in the intervals between passing his accounts, he receives sums of such an amount as to make it worth while to lay them out, he ought to apply by summons for an order to pay them into court, that they may be productive for the benefit of the estate (*b*). If the receiver keeps in his hands money which he has been directed to pay into court, it is no excuse for him to say that the circumstances of the estate made it necessary to keep large sums in hand, nor will it prevent the court

(*y*) R. S. C. Ord. LV. 70. As to form of certificate of allowance, see Dan. Ch. Forms, 5th ed.

(*z*) Supreme Court Funds Rules, 1905, r. 30.

(*a*) Supreme Court Funds Rules, 1905, r. 5.

(*b*) *Shaw v. Rhodes*, 2 Russ. 539. As to form of summons, see Dan. Ch. Forms, 5th ed.

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from directing an inquiry as to what sums might or ought to have been reasonably laid out at interest (*c*). Where the order appointing a receiver does not provide for the payment of his balances into court, the receiver will not be allowed to avail himself of the omission, and to keep a balance in his hands without interest, under a pretence of waiting for some party to the action to obtain an order upon him for payment in (*d*). He ought to apply by summons, which should be served on the parties to the action, for an order for that purpose, and that the costs be allowed him in his next account; and, unless he does so, the court will charge him with interest (*e*).

Consequences of default by receiver.

If a receiver makes default in leaving any account or affidavit, or in passing his accounts, or in making any payment, or otherwise, the receiver or the parties, or any of them, may be required to attend at chambers to show cause why the account or affidavit has not been left, or the account passed, or the payment made, or any other proper proceeding taken (as the case may be), and all proper directions may thereupon be given at chambers, or upon an adjournment into court, including the discharge of the receiver, the appointment of another, and payment of costs (*f*). If the receiver brings in his account, but does not attend to pass it, after a summons to show cause why he has not done so has been served on him, the Master may allow the sums with which the receiver

(*c*) *Hicks v. Hicks*, 3 Atk. 5th ed. 274.

(*d*) *Potts v. Leighton*, 15 Ves. 273, 274; see, too, 1 Ba. & Be. 230.

(*e*) Dan. Ch. Pr. 7th ed. p. 1448. As to form of summons, see Dan. Ch. Forms,

(*f*) R. S. C. Ord. L. 21; Dan. Ch. Pr. 7th ed. p. 1448. As to form of summons, see Dan. Ch. Forms, 5th ed.; and, as to form of order, see Seton, 7th ed. pp. 773, 781.

has charged himself, and disallow such of his payments as he has failed to vouch (*g*). In the chambers of some of the judges of the Chancery Division, the practice is to write to the receiver personally, where accounts have not been left. Where a summons is taken out, it must be served on the receiver, and if he does not appear, the order will be made on production of an affidavit of service of the summons, or, where the default consists in not making a payment into court, of the order and certificate under which the payment ought to have been made; and the Paymaster-General's certificate of the default must be produced in support of the application (*h*). The order is drawn up by the registrar, and an indorsed copy must be served personally on the receiver; or, if personal service of the order cannot be effected, an order giving leave to substitute service should be obtained at chambers, on an *ex parte* application by summons, supported by affidavit, and the last-mentioned order must be served in conformity with the directions thereby given (*i*). If after such original or substituted service the receiver neglects to obey the order, it may be enforced against him by process of contempt (*k*). A similar course should be pursued against a receiver who is directed to pay his balance to the parties instead of into court, and neglects to do so. It is irregular to issue a writ of *fi. fa.* for such a balance (*l*).

(*g*) Dan. Ch. Pr. 7th ed. p. 1447.

(*h*) Dan. Ch. Pr. 7th ed. p. 1448.

(*i*) Dan. Ch. Pr. 7th ed. p. 1448.

(*k*) *Re Bell's Estate*, L. R. 9 Eq. 172.

(*l*) *Whitehead v. Lynes*, 34 Beav. 161, 165; affd. 12 L. T. 332. In that case, two writs of *fi. fa.*, having been improperly put in execution against a receiver to compel payment of money, the Court of Chancery, upon the persons who had

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A four-day order requiring a receiver to bring in his accounts may be had by one of several joint receivers against another who is in default. For, even though joint receivers be, by the terms of their appointment, required to account jointly, each of them must bring in his accounts of what he individually receives; and, where the Master has certified that one of them is in default, the four-day order is of course, as long as that certificate stands (*m*).

The receiver in an action may be ordered to pass his accounts and pay over the balance, although the action has been dismissed (*n*), or the proceedings in it have been ordered to be stayed (*o*).

A receiver who does not pay into court money which has been found to be due to him, and which he has been directed to pay, is liable to attachment under section 4. sub-section 3, of the Debtors Act, 1869 (*p*).

Under R. S. C. Ord. XLII. rr. 3, 24, and Ord. XLIII. r. 6, a writ of sequestration against the estate and effects of a receiver, for disobedience to an order of the court, may be issued without the leave of the court (*q*).

Where a receiver neglects to leave and pass his

Disallow-
ance of
salary and

caused the writs to be issued requiring the matter to be tried at law, abstained from directing an inquiry as to the damages alleged to have been sustained by the receiver, and ordered that the matter should be tried, and the damages (if any) assessed, in an action at law.

(*m*) *Scott v. Platel*, 2 Ph. 229, at pp. 230, 231.

(*n*) *Pitt v. Bonner*, 5 Sim. 577; see, too, *Hutton v. Beeton*,

9 Jur. N. S. 1339.

(*o*) *Paynter v. Carew*, Kay, App. 36, 44.

(*p*) *Re Gent*, 40 Ch. D. 190.

(*q*) *Sprunt v. Pugh*, 7 Ch. D. 567. The writ will be issued on production of the order showing date of entry (see Ord. XLII. r. 11) and proof of service and default; see Dan. Ch. Pr. 7th ed. p. 729; see Ord. XLI. r. 5 as to limitation of time.

accounts, and to pay the balances thereof at the times fixed for that purpose, the judge before whom the receiver has to account may, from time to time, when his subsequent accounts are produced to be examined and passed, disallow the salary therein claimed by such receiver, and may also, if he shall think fit, charge him with interest at the rate of 5 per cent. per annum upon the balances so neglected to be paid by him, during the time the same shall appear to have remained in his hands (r).

Chap. X.
charge of
interest on
unpaid
balances.

In an old case, in which a receiver of the personal estate of a testator had been appointed, the Court of Chancery declined to charge him with interest on each sum from the time when it was received, but charged him as an executor would be charged, that is by making yearly or half-yearly rests in the account(s). And the present practice is in substantial accordance with that decision (t).

The remedies which have been indicated remain for the most part available against a receiver even after he has been discharged. Thus, in a case where a receiver who had been discharged had not paid in his balance, he was ordered to pay in the same, and also the amount allowed for his salary, together with interest on both sums at 5 per cent. from the day appointed, and to pay the costs of the application (u). Where, however, default had been made by the executors of a deceased receiver, the sureties were only ordered to pay interest at 4 per cent. (x).

(r) R. S. C. Ord. L. r. 18. r. 18, and Dan. Ch. Pr. 7th ed.

(s) *Potts v. Leighton*, 15 Ves. p. 1449.

273. (u) *Harrison v. Boydell*, 6

(t) See *per* Lord Eldon in Sim. 211.

Potts v. Leighton, 15 Ves. at (x) *Clements v. Beresford*, 10
p. 277; also R. S. C. Ord. L. Jur. 771.

Chap. X. A receiver may be surcharged on his accounts, notwithstanding he has been discharged (*y*).

A receiver may be charged with interest on moneys improperly kept in his hands, although he has passed his accounts, and all parties have expressed themselves satisfied; and for this purpose an inquiry what money he has received from time to time, and how long he has kept it in his hands, may be directed (*z*). In *Anon. v. Jolland* (*a*), Lord Eldon intimated that, if such a case should be brought before him, it would at least be a very grave question whether the receiver should be ordered to make good any loss which might have been occasioned from a difference in the price of Government funds between the time when the receiver's balance was paid in, and the time when it ought to have been paid in.

In *Hicks v. Hicks* (*b*), where a receiver had been appointed over an estate during the minority of an infant who had no guardian, and had been directed to place out the surplus rents and profits of the estate, when they should amount to a competent sum, with the approbation of the Master, on Government or other securities, but had omitted so to do, Lord Hardwicke directed that he should pay interest at the rate of 4 per cent. on the surplus rents and profits from the date of the decree until the infant came of age, although the infant, two days after he came of age, settled accounts with the receiver, who delivered up his vouchers and gave him copies of all the accounts passed by the Master.

It has been held in Ireland that a receiver's accounts,

Accounts
of a
receiver

- | | |
|---|-----------------------------|
| (<i>y</i>) <i>Re Edwards</i> , 31 L. R. Ir. | Jr. 85. |
| 242. | (<i>a</i>) 8 Ves. 72, 73. |
| (<i>z</i>) <i>Fletcher v. Dodd</i> , 1 Ves. | (<i>b</i>) 3 Atk. 276. |

which have been vouched before the examiner, can be reopened on the discovery of error in them, notwithstanding that the judge's certificate is attached (*c*). Chap. X.
may be
reopened.

The mortgagor is entitled to credit for rents received by the receiver appointed in a foreclosure action during the period between the date of the Master's certificate and the day fixed for redemption. In such cases a fresh account will be directed, and a further time (usually one month) given to the mortgagor to redeem (*d*). But, if the rents have been received after default has been made in payment on the day fixed for redemption, but before the affidavit of the default is sworn, an order for final foreclosure will be made without any further account (*e*). And where the order for foreclosure *nisi* provided that any person redeeming, or the plaintiff in the event of foreclosure, might apply at chambers for payment of any moneys in the hands of the receiver, and after certificate further moneys came to the hands of the receiver, an order absolute was made without a further account being directed, or a fresh day to redeem being given (*f*). Accounts
of receiver
appointed
in fore-
closure
action.

Where a receiver had received rents of mortgaged property between the date of the certificate under a fore-

(*c*) *Re Browne*, 19 L. R. Ir. 423. *v. Usborne*, W. N. 1890, 92.

(*d*) *Jenner-Fust v. Needham*, 32 Ch. D. 582; *Peat v. Nicholson*, 34 W. R. 451; but see *Welch v. National Cycle Works*, 35 W. R. 137. (*f*) *Coleman v. Llewellyn*, 34 Ch. D. 143; see, too, as to form of order, *Smith v. Pearman*, 36 W. R. 681; *Barber v. Jeckells*, W. N. 1893, 91; *Cheston v. Wells* [1893], 2 Ch. 151; *Simmons v. Blandy* [1897], 1 Ch. 19; *Christy v. Godwin*, 38 S. J. 10; *Lusk v. Sebright*, 71 L. T. 59; *Blaiberg v. Gatti*, 100 L. T. Jo. 441.

(*e*) *National Building Society v. Raper* [1892], 1 Ch. 54, following *Constable v. Howick*, 5 Jur. N. S. 331, and not following *Ross Improvement Commissioners*

Chap. X. closure judgment and the day fixed for redemption, and also after that day, but the amount of those rents was stated to be not sufficient to cover the receiver's out-of-pocket expenses and remuneration, so that nothing available for redemption had in fact been received, the court, in order to save expense and further delay, upon the submission of the plaintiff to have his order for foreclosure absolute discharged, if the court should thereafter so direct in consequence of its appearing that there were surplus moneys, allowed the receiver's account to be taken at once, leaving the question of his discharge to stand over until after the taking of the account (*g*).

In a case where a receiver appointed in a foreclosure action had brought in his final account, and the foreclosure had been made absolute, but it afterwards appeared that the receiver had omitted some rents from his account, it was held that, in the absence of any evidence that the plaintiff in the foreclosure action had received any of the rents which the receiver had not accounted for, there was no reason why the foreclosure should be opened, merely because the receiver, who was not the plaintiff's agent but an officer of the court, had made a mistake which was not discovered before it was too late (*h*).

Accounts
of deceased
receiver.

An order may be obtained, on summons at chambers, that the executors of a deceased receiver be at liberty to pass his accounts, and to lodge the balance in court (*i*). In a case where, on the executors' application, liberty

(*g*) *Ellenor v. Ught*, W. N. Seton, 7th ed. p. 781; see, too, 1895, 161. 15 Sim. 483; and, as to form of

(*h*) *Ingham v. Sutherland*, 63 L. T. 614. summons, see Dan. Ch. Forms, 5th ed.

(*i*) For form of order see

had been given them to pass their accounts and to pay in the balance, they were not allowed, after the lapse of many years, to object to the order on the ground of want of assets (*k*).

The order cannot, however, be obtained without the consent of the executors. If the executors do not consent, the court has no jurisdiction to order, in a summary way, that they shall bring in and pass the deceased receiver's accounts, and pay the balance out of his assets (*l*). The proper course to follow, if the recognizance cannot be put in suit, is to bring an action against the personal representatives or representative of the deceased receiver for an account (*m*).

An admission by a receiver's executor of assets to answer what is due from his testator is sufficient to make the executor liable to pay such interest as the receiver's estate may be charged with in respect of the rents retained in his hands (*n*). But, if there has been laches of the parties, the executor will only be ordered to pay in the principal money and the costs of the application (*o*).

Where a receiver neglects to bring in his accounts, or, having brought them in, fails to pay the balance certified to be due from him within the time limited, and has been proceeded against for the contempt of court, the party prosecuting the contempt may put the recognizance in suit against the sureties. But he is not at liberty to sue the sureties until he has taken proceedings against the

Putting re-
cognizance
in suit.

(*k*) *Gurden v. Badcock*, 6 Beav. 157.

(*n*) *Foster v. Foster*, 2 Bro. C. C. 615; *Tew v. Lord Winter-
ton*, cit. 4 Ves. 606.

(*l*) *Jenkins v. Briant*, 7 Sim. 171.

(*o*) *Gurden v. Badcock*, 6 Beav. 157.

(*m*) *Ludgater v. Channell*, 15 Sim. 482; 3 Mac. & G. 180.

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receiver for the contempt, unless the receiver has become bankrupt, or it can be shown that proceedings against him for contempt would be useless (*p*).

Where the receiver's recognizance is to be put in suit, an order must first be obtained to authorise the proceeding. This order is usually obtained on summons, which must be served personally on the receiver, or his representatives, and also upon the sureties, if they are to be proceeded against (*q*).

An order for leave to put the recognizance in suit having been obtained, the next step used to be to proceed by *scire facias*, in the names of the cognizees named in the recognizance, or the survivor of them, or the executors or administrators of the survivor (*r*), against the cognizors therein named, or any of them, or their respective heirs, executors, or administrators (*s*). At the present day, however, the procedure by *scire facias*, though still available, is practically obsolete. In most cases the bond of a guarantee society is accepted instead of a recognizance; and, if a recognizance has been taken and the receiver has made default, an action to enforce the recognizance may be avoided, by the sureties submitting to the jurisdiction of the court, in the action in which the receiver was appointed, as fully as if an action to enforce their bond and recognizance as sureties for the receiver had been brought (*t*).

(*p*) Smith, Ch. Pr. 1037. See, too, *Ludgater v. Channell*, 3 Mac. & G. at p. 176, note (*a*).

(*q*) *Thurlow v. Thurlow*, 4 Jur. 982; Dan. Ch. Pr. 7th ed. p. 1450. As to form of summons, see Dan. Ch. Forms, 5th ed., and, as to order in such case,

see Seton, 6th ed. p. 806.

(*r*) Seton, 6th ed. p. 806.

(*s*) Dan. Ch. Pr. 7th ed. pp. 1450—1452, where the course of procedure by *scire facias* on a receiver's recognizance is stated in detail.

(*t*) See, e.g., *Re Graham*,

Upon the death of a receiver, the parties interested may come to the court either against his representatives, or against his sureties, and they should in the first place apply against both, in order to avoid the objection which, if either were omitted, the persons made respondents might raise to the absence of the persons omitted. The court, without deciding whether the representatives or the sureties are primarily liable, can make an order allowing the deceased receiver's recognizance to be enforced against his real and personal representatives and sureties (*u*).

It was laid down by Shadwell, V.-C., in *Ludgater v. Channell* (*x*), on the authority of the registrars, to be the then practice not to put the recognizance in suit against the surety, in default of the receiver paying what was due from him, without the amount being first ascertained, except where the receiver had absconded; and that a breach of the recognizance by non-payment of the balance reported due from the receiver ought to be shown, as a ground for granting an application for liberty to put the recognizance in suit; but Lord Truro, before whom the case came, on appeal from the Vice-Chancellor, in the year 1851, thought that the recognizance might, in the case of a deceased receiver, be enforced against the surety without ascertaining the amount due, where there was no means of ascertaining or enforcing the claim. The case of an absconding receiver, as put by the registrars, he regarded as only an example of an exceptional case in which it was difficult to ascertain the amount due (*y*).

Graham v. Noakes [1895], 1 Ch. Mac. & G. 175, 179—181.

66, at p. 67; also Dan. Ch. Pr. (*x*) 15 Sim. 479.

7th ed. p. 1452.

(*y*) *Ludgater v. Channell*, 3

(*u*) *Ludgater v. Channell*, 3 Mac. & G. 180.

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Result of
receiver's
account to
be certified.

A certificate of the Master, stating the result of a receiver's account, is enjoined by the Rules of the Supreme Court to be taken from time to time^(z). The form of certificate is given in Daniell's Chancery Forms *(a)*.

Accounts
of receiver
appointed
by debenture
holders
to be filed.

A receiver appointed of the property of a company under the powers of any instrument must every half-year and upon ceasing to act file with the registrar of companies an abstract of his accounts *(b)*.

- (z)* R. S. C. Ord. L. r. 22. 1908 (8 Edw. 7, c. 69), section
- (a)* Form 1738, 5th ed. 95.
- (b)* Companies (Cons.) Act,

CHAPTER XI.

DISCHARGE OF A RECEIVER.

UNLESS the minutes of the order appointing or continuing a receiver, or a receiver and manager, contain a provision for his discharge (*a*), an application to the court is generally necessary, in order to divest his possession (*b*). The appointment of a receiver made previously to the judgment in an action will not be superseded by it, unless the receiver is appointed only until judgment or further order (*c*). But an order to put a purchaser into possession is in itself a discharge of a previous order for a receiver as to the lands mentioned in the subsequent order (*d*). And where the estate over which a receiver has been appointed expires, the reversioner or remainderman need not apply to have the receiver discharged; for in such a case, the legal estate vesting in possession, and there being an indisputable right to enter, it is not necessary that there should be an order discharging the receiver (*e*).

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As a general rule, where a receiver has been appointed and has given security, he will not be discharged upon his own application, without showing some reasonable cause why he should put the parties to the expense of a

Discharge of receiver on his own application.

(*a*) *Day v. Sykes, Walkers & Co.*, 55 L. T. 763; W. N. 1886, 209.

(*b*) *Thomas v. Brigstocke*, 4 Russ. 64.

(*c*) See *ante*, p. 10.

(*d*) *Ponsonby v. Ponsonby*, 1 Hog. 321; *Anon.*, 2 Ir. Eq. 416.

(*e*) *Re Stack*, 13 Ir. Ch. 213.

Chap. XI. change (*f*). If, however, he can show reasonable cause for his discharge, he may be discharged, and allowed to deduct the costs of and incidental to the application for discharge out of any balance in his hands (*g*). Infirmary preventing the receiver from properly performing his duties, and ill health increased by the anxieties of the duties of his office, afford sufficient excuses for his discharge (*h*).

A receiver who wishes to be discharged, and cannot show any reasonable cause for putting the parties to the expense of a change, will, as a rule, be discharged at his own request only, if at all, on the terms of his paying the costs of the appointment of another receiver and consequent thereon. But in one case, in which a receiver had acted for many years and had paid in his balance, the court did not charge him with the costs of his removal and the appointment of another receiver (*i*).

A receiver ought not to make an application for discharge to come on with the further consideration of the action; for the court can, on the further consideration, discharge him without such an application. Accordingly, the costs of a separate application for discharge will be refused (*k*).

Discharge
of receiver
on satis-
faction of
incum-
brance.

A receiver is generally continued until judgment in the action in which he has been appointed; but, if the right of the plaintiff ceases before that time, the receiver may be discharged at once, and cannot be continued at the instance of a defendant (*l*). Accordingly, in a case in

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|---|--|
| (<i>f</i>) <i>Smith v. Vaughan</i> , Ridg. temp. Hard. 251. | Eq. 356. |
| (<i>g</i>) <i>Richardson v. Ward</i> , 6 Madd. 266. | (<i>k</i>) <i>Stilwell v. Mellersh</i> , 20 L. J. Ch. 356. |
| (<i>h</i>) <i>Ib.</i> | (<i>l</i>) <i>Davis v. Duke of Marlborough</i> , 2 Sw. 167, 168. |
| (<i>i</i>) <i>Cox v. Macnamara</i> , 11 Ir. | |

which a receiver had been appointed at the suit of an annuitant, and the plaintiff had been satisfied by the payment of his demand, Lord Eldon held that the order for a receiver must be discharged, although the discharge was opposed by two creditors having annuities prior to the plaintiff's annuity. "With the right of the plaintiff to have a receiver," he said, "must fall the rights of the other parties. It would be most extraordinary, if, because a receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a receiver appointed on his behalf" (*m*). In other cases, however, of a somewhat similar character, proceedings have been stayed without prejudice to the order appointing a receiver (*n*).

If, in the course of the proceedings, the continuance of a receiver becomes unnecessary, he will be discharged. Thus, in a case where a receiver had been appointed in consequence of the misconduct and incapacity of trustees under a will, he was ordered to be discharged on the appointment of new trustees, who undertook to account half-yearly in the same way as a receiver, and agreed to act without a salary (*o*). So, where a receiver, who had been appointed in consequence of the executors of a testator's will having refused to act, quitted his place of residence in the vicinity of the estates over which he had been appointed receiver, the court, on the consent of the other parties to the cause, and the executors expressing

Discharge
of receiver
on his con-
tinuance
becoming
unneces-
sary.

(*m*) *Davis v. Duke of Marlborough*, 2 Sw. at p. 168; and see 18 Jur. 419; *Murrough v. French*, 2 Moll. 498.

(*o*) *Bainbrigge v. Blair*, 3 Sankey v. O'Maley, 2 Moll. 491; but see 2 Sw. 118; *Largan v. Bowen*, 1 Sch. & Lef. 296; *Murrough v. French*, 2 Moll. 498. Beav. 421, 423. Secus, if on the appointment of new trustees, there are questions still out-

(*n*) *Damer v. Lord Portarlington*, 2 Ph. 34; *Paynter v. Carew*, *Reeves v. Neville*, 10 W. R. 335.

Chap. XI. their willingness to act, made an order that the receiver should pass his accounts (*p*). So, also, where a receiver had been appointed at the suit of an annuitant, he was discharged on payment of the arrears of the annuity, there being no reason, under the circumstances of the case, why he should be continued (*q*). And in another case a receiver was discharged, when the object of his appointment had been fully effected (*r*).

Other
causes for
discharging
a receiver.

A receiver is liable to be discharged for irregularity in carrying in his accounts, for conduct making it necessary to take proceedings to compel him to do so, and for so passing his accounts that the amount of the balance in his hands cannot be ascertained (*s*). Again, a receiver may be removed, if his conduct has been such as to impede the impartial course of justice (*t*), or to amount to a gross dereliction of duty (*u*), or if his appointment as a receiver has been improper (*x*).

It is conceived, however, that a charge of misbehaviour against a receiver, for suffering the owner of an estate over which the receiver was appointed to remain in part possession of it to the prejudice of the estate, will not be regarded by the court as a sufficient reason for discharging the receiver; for in such a case the parties themselves have caused the loss, by not compelling the owner by the authority of the court to deliver up possession to the receiver (*y*).

- (*p*) *Davy v. Gronow*, 14 L. J. 1873, 232.
 Ch. 134. (*u*) *Re St. George's Estate*, 19
 (*q*) *Braham v. Lord Strathmore*, 8 Jur. 567. L. R. Ir. 566.
 (*x*) *Re Lloyd*, 12 Ch. D. 448;
 (*r*) *Tewart v. Larson*, L. R. 18 *Nicman v. Nieman*, 43 Ch. D.
 Eq. 490; see, too, *Hoskins v.* 198; *Re Wells*, 45 Ch. D. 569;
Campbell, W. N. 1869, 59. *Brean v. Morrissey*, 26 L. R. Ir.
 (*s*) *Bertie v. Lord Abingdon*, 8 618.
 Beav. 53. (*y*) *Griffith v. Griffith*, 2 Ves.
 (*t*) *Mitchell v. Condry*, W. N. 400.

Where a receiver becomes bankrupt, he will be discharged, and another receiver will be appointed (*z*). Chap. XI.

If a receiver has been wrongly appointed over property belonging to a person who is not a party to the action, he will be discharged, even though there has been an abatement of the action by the death of a sole defendant (*a*).

The court will discharge a receiver upon the application of a prior mortgagee demanding to go into possession as such (*b*).

In one case, in which a receiver had been appointed in an administration suit, another person, who was willing to act at a lower salary, was ordered to be substituted for him, as receiver, on the application of a mortgagee of a tenant for life of the property (*c*).

In the case of an infant, it is not right to vacate the recognizance of a receiver appointed on behalf of the infant immediately upon his coming of age and the receiver passing his accounts; for defalcations are sometimes found after a great length of time; and, if it were proved long after the coming of age that the receiver had not accounted for what he had received, the money might be recovered under the recognizance, if it had not been vacated (*d*). Lord Kenyon held that a receiver ought not to have his recognizance discharged until after the expiration of a year from the infant's attainment of the age of twenty-one years, and Lord Eldon approved of that rule (*e*).

Discharge
of receiver
over estate
of infant.

(*z*) Dan. Ch. Pr. 7th ed. p. 1454. *Re Metropolitan Amalgamated*

(*a*) *Lavender v. Lavender*, Ir. *Estates*, W. N. 1912, 219.
R. 9 Eq. 593.

(*c*) *Stanley v. Coulthurst*, W. N.

(*b*) *Re Southern Railway Co.*, 1868, 305.

17 L. R. Ir. 137. See, too, (*d*) *Anon.*, cited, 2 Madd. Ch.
Preston v. Tunbridge Wells Opera Pr. 2nd ed. p. 244.

House [1903], 2 Ch. 323; (*e*) *Ib.*

Chan. NL.

Discharge
of receiver
of estates
decreed to
be sold.

Where estates over which a receiver has been appointed have been ordered to be sold, the receiver will be continued until the conveyances are executed under the order, in order that he may collect any arrears of rent (*f*). In *Quinn v. Holland* (*f*) a party refused to execute a conveyance, on the ground that arrears of rent were due, and that by executing the conveyance he would extinguish his remedy; and thereupon the court directed the receiver to be continued in regard to those rents down to the day of executing the conveyance, and directed that the tenants should be compelled to pay their arrears to the receiver according to the course of the court (*f*).

Receiver
not dis-
charged
until
balance
due to him
on his
accounts
paid.

The receiver of an estate will not be discharged until he has received from the parties interested in the estate any balance found due to him on passing his accounts (*g*). In administration actions a receiver may be discharged on passing his accounts, and be paid his remuneration and costs, without waiting to see whether the estate is sufficient to pay all costs payable out of it (*h*).

Receiver
not dis-
charged on
application
of one
party only.

A receiver being appointed for the benefit of all the parties interested, he will not be discharged on the application of that party only at whose instance he was appointed (*i*); nor, where a receiver has been appointed on behalf of infant tenants in common, will he be discharged as to the share of one of them who has attained twenty-one (*k*).

Mode of
application
to dis-
charge a
receiver (*l*).

The application to discharge a receiver appointed in an

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|---|---|
| (<i>f</i>) Ridg. temp. Hard. 295. | <i>borough</i> , 2 S. W. 118; <i>Bainbrigge</i> |
| (<i>g</i>) <i>Bertrand v. Davies</i> , 31 Beav. 436, <i>infra</i> , p. 327. | <i>v. Blair</i> , 3 Beav. 421, 423. |
| (<i>h</i>) <i>Batten v. Wedgwood, &c.</i> , Co., 28 Ch. D. 317. | (<i>k</i>) <i>Smith v. Lyster</i> , 4 Beav. 227, 229. |
| (<i>i</i>) <i>Davis v. Duke of Marl-</i> | (<i>l</i>) As to practice in Lunacy, see Rules in Lunacy, 1893, r. 9. |

action may be made by petition, motion, or summons (*m*), or the direction for his discharge may be given in the judgment at the trial, or in the order upon further considerations (*n*). In the King's Bench Division the application for a discharge is made to a judge in chambers by summons.

A summons, notice of motion, or petition, for the discharge of a receiver, should be served on all the parties (*o*). The service of it on the receiver should be personal, and such service will not be dispensed with unless an order for substituted service is obtained (*p*). But a receiver, though served, is not entitled to appear at the hearing of the application, unless some personal charge is made against him. If he appears, he will not be allowed the costs of his appearance (*q*), except under special circumstances (*r*).

Applica-
tion must
be served
on parties.

Appear-
ance.

If the receiver has not passed his final account and paid over any balance found due from him, the order discharging him directs him to do so; and, if he has given a recognizance, it directs the recognizance to be vacated on his passing his final account, and lodging in court any balance which may be certified to be due from him (*s*). An office copy of the recognizance, if any, is in

Form of
order on
discharging
receiver.

(*m*) Seton, 7th ed. p. 781; and as to forms of petition, notice of motion, and summons, see Dan. Ch. Forms, 5th ed. The application is now usually made by summons. Dan. Ch. Pr. 7th ed. p. 1454, note (*r*).

(*n*) Seton, 7th ed. pp. 781, 782.

(*o*) Dan. Ch. Pr. 7th ed. p. 1454.

(*p*) *Att.-Gen. v. Haberdashers' Company*, 2 Jur. 915.

(*q*) *Herman v. Dunbar*, 23 Beav. 312; and see *supra*, p. 264.

(*r*) *General Share Co. v. Wetley Brick Co.*, 20 Ch. D. 260, 267.

(*s*) Seton, 7th ed. p. 781; Dan. Ch. Pr. 7th ed. p. 1454. An order to vacate a receiver's recognizance will not be made on petition of course, even where all parties consent. Dan. Ch. Pr. 7th ed. p. 1454, note (*r*).

Chap. XI. the chambers of some of the judges of the Chancery Division, required to be procured from the Filing Department of the Central Office, and left at the time of bespeaking the order. The practice is, however, not uniform in this respect.

The practice on vacating bonds and recognizances is as follows: the original or duplicate order to vacate the recognizance or bond is produced to the proper officer at the Filing Department, and the vacating note is stamped on the recognizance or bond, and the order, which are returned to the solicitor on his receipt for the same: a copy of the order must be filed. If the order to vacate is conditional on the performance of some act by the receiver, or is contingent on any event, it must first be produced to the Master or registrar, who on being satisfied that the condition has been fulfilled will endorse on it a direction that the bond or recognizance may be vacated, pursuant to the terms of the order (*t*).

In an Irish case, in which a receiver was discharged owing to gross dereliction of duty, the order discharging him disallowed his fees and poundage on all accounts not passed within the prescribed time, and directed him to pay interest on the balance (if any) from time to time in his hands, and to pay the costs of the motion to discharge him, of his own discharge, and of the appointment of his successor (*u*).

It is prescribed by the Rules of the Supreme Court that when a recognizance is, by any judgment or order, directed to be vacated, the proper officer shall, on due

Vacating
recogni-
zances.

As to form of summons to vacate recognizance, see Dan. Ch. Forms, 5th ed.	to R. S. C. Ord. LXL. r. 8A. (<i>u</i>) <i>Re St. George's Estate</i> , 19 L. R. Ir. 566.
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(*t*) See Annual Practice, nn.

notice thereof, attend one of the two Masters to whom the recognizance was given, who shall thereupon vacate the recognizance in the usual manner (*x*). Chap. XI.

A receiver of the property of a company appointed under the powers of any instrument who has entered into possession must, on ceasing to act, file with the Registrar of Companies notice to that effect and an abstract of his accounts (*y*). Receiver appointed by debenture holders ceasing to act.

(*x*) R. S. C. Ord. LX. 4. As to surcharging a receiver, or ordering him to lodge a balance in court, notwithstanding that he has been discharged, see *supra*, pp. 277, 280.

(*y*) Companies (Cons.) Act, 1908 (8 Edw. 7, c. 69), s. 95.

CHAPTER XII.

LIABILITIES AND RIGHTS OF SURETIES.

Chap. XII.

Discharge
of sureties.

THE sureties for a receiver will not be discharged at their own request. Where, therefore, an application was made to discharge a receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held that no regard was to be had to their application, unless it was for the benefit of the estate, or unless there were special circumstances in the case (*a*); as, for instance, where underhand practice can be proved, and the person secured by the recognizance can be shown to have been connected with such practice (*b*). In *Swain v. Smith* (*c*) a surety was discharged on his own application, where he had become surety in violation of his partnership articles.

On dis-
charge of
surety
fresh recog-
nizance is
necessary.

Where a surety procures his discharge during the continuance of the receivership, the receiver must enter into a fresh recognizance with new sureties (*d*).

Death, &c.,
of surety.

Where one of the sureties of a receiver dies, leaving real property bound by his recognizance, his death is no ground for requiring the receiver to procure a new surety. But where it appeared that the deceased surety had not left any property which could be made available

(*a*) *Griffith v. Griffith*, 2 Ves. Sen. 400; as to application by a surety for his discharge, see *O'Keefe v. Armstrong*, 2 Tr. Ch. 115.

Moll. 407, per Lord Mannors, L. C.

(*c*) Seton, 7th ed. p. 775.

(*d*) *Vaughan v. Vaughan*, 1 Dick. 90; *Blois v. Betts*, ib. 336.

(*b*) *Hamilton v. Brewster*, 2

for the purpose of satisfying the recognizance, the court directed a new surety to be appointed (*e*). Chap. XII.

Where one of the sureties dies, or goes abroad, and the receiver is unable to procure another surety, it is not the practice to charge the receiver with the expense of his discharge, or of the appointment of a new receiver (*f*).

When a surety becomes bankrupt, the receiver is usually required to enter into a fresh recognizance with two or more sureties. The order is made on summons (*g*).

In *Shuff v. Holdaway* (*h*), an order was made on the application of a surety, directing the receiver's accounts down to that time to be passed, and that, on payment into court by the receiver, or by the applicant, of the certified balance (not exceeding the penalty), the applicant should be discharged as surety, and should be at liberty to apply to have the recognizance vacated as to him, and that the applicant should be at liberty to attend the taking of the accounts; but he was ordered to pay the costs of the application.

Order on discharge of surety.

Where a receiver has become bankrupt, and the sureties are likely to be called upon to pay the balance due from him, liberty will be given to them to attend the passing of the receiver's account (*i*); and similarly,

Surety allowed to attend passing of accounts of bankrupt receiver.

(*e*) *Averall v. Wade*, Fl. & K. 341.

(*f*) *Lane v. Townsend*, 2 Ir. Ch. 120.

(*g*) Dan. Ch. Pr. 7th ed. p. 1455. As to form of summons, see Dan. Ch. Forms, 5th ed.

(*h*) 3rd September, 1857, cited

in Dan. Ch. Pr. 7th ed. p. 1455; see, too, *O'Keefe v. Armstrong*, 2 Ir. Ch. 115. A surety is not entitled to attend on the taking of a receiver's accounts except at his own expense. *Re Birmingham Brewery Co.*, 31 W. R. 415.

(*i*) *Dawson v. Raynes*, 2 Russ.

Chap. XII. where a receiver had died in insolvent circumstances, and his personal representative had consented to his final account being taken in the suit to which he was appointed, liberty to attend was given to the personal representative (*k*).

Extent of
liability of
surety.

The surety is answerable, to the extent of the amount of the recognizance, for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal, and of the appointment of a new receiver in his place (*l*). This statement of the law was approved in *Re Graham*, *Graham v. Noakes* (*m*), by Chitty, J., from whose judgment it may, it is conceived, be concluded that, in ascertaining the liability of sureties under a receiver's recognizance, the court proceeds on the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into court or to account for. Consequently, where a receiver of "rents and profits" of real estate had (1) insured some of the farm buildings in his own name and received and misapplied the insurance money, had (2) received and not accounted for dividends on consols in court representing proceeds of sale of real estate, and had (3) received under an order of the court money representing personal estate to be spent in repairs, which money he had misappropriated, it was held that the sureties had been properly charged in respect of

467. As to form of summons by surety to attend the passing of a receiver's accounts, see Dan. Ch. Forms, 5th ed.

(*k*) *Simmons v. Rose*, 20th November, 1860, cited in Dan. Ch. Pr. 7th ed. p. 1456.

(*l*) *Mumseil v. Egan*, 3 J. & L. 251; *Re MacDonaghs*, Ir. R. 10 Eq. 269; *Smart v. Flood*, 49 L. T. 467. Comp. *Watters v. Watters*, 11 Ir. Eq. 336.

(*m*) [1895], 1 Ch. 66, at p. 70.

those three items (*n*). In a case, however, where a receiver had been bankrupt with the knowledge of all parties for a considerable time, during which no steps were taken to compel the passing of his accounts, the surety was excused from payment of interest (*o*). On taking a defaulting receiver's account, the court does not necessarily exact from his surety the full amount of the sum mentioned in the recognizance (*p*). Chap. XII.

The liability of the surety under the ordinary bond is to make good the net loss, caused by the receiver's default, to the estate which is being administered: where, therefore, a receiver and manager had properly incurred, and was entitled to be indemnified against, trade liabilities to the extent of 900*l.*, but was in default to the estate to the extent of 400*l.*, it was held that, inasmuch as the trade creditors could only claim against the estate to the net amount of the receiver's indemnity, *i.e.*, 500*l.*, the estate had suffered no loss by reason of the receiver's default, and that, consequently, the sureties could not be called upon to pay the 400*l.* (*q*).

Inasmuch as a committee or receiver of the estate of a lunatic is not accountable in the lunacy in his character of committee or receiver for rents and profits received after the death of the lunatic, his surety cannot be made liable in respect of the receiver's default as to such rents and profits (*r*).

(*n*) *Re Graham, Graham v. Noakes* [1895], 1 Ch. 66.

(*o*) *Darson v. Raynes*, 2 Russ. 466; see, too, *Re Herricks*, 3 Ir. Ch. 187.

(*p*) *Per Chitty, J.*, in *Re Graham, Graham v. Noakes* [1895], 1 Ch. at p. 70.

(*q*) *Re British Power, &c. Co.*

[1910], 2 Ch. 470; in the earlier case of *Re London United Breweries* [1907], 2 Ch. 511, the sureties had paid the amount by which the receiver was in default without contesting their liability. See further as to these cases, p. 315, *post*.

(*r*) *Re Walker* [1907], 2 Ch. 120.

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Course for
surety
to pursue
when
action is
brought
against him
on recog-
nizance.

Where an action is brought against a surety upon the recognizance, the proper course for him to pursue is conceived to be to apply to the court by motion or summons, with notice to the parties interested, in the action to which the receiver was appointed, to stay the proceedings on the recognizance, offering at the same time to lodge what is due from the receiver, to an amount not exceeding the penalty of the recognizance, in court(s). The surety must pay the costs of his application, and of the proceedings in consequence of it (t). If the receiver's account has not been taken, the application should also ask for an inquiry as to what is due from the receiver. The court may, it is conceived, upon an application of this kind, indulge the surety by allowing him to pay the balance due from the receiver by instalments (u).

Sureties
should not
pay to the
solicitor
of the
plaintiff.

Payment by a surety to the solicitor prosecuting the proceedings is insufficient. In a case where a surety, being sued upon his recognizance, paid the amount to the solicitor prosecuting the proceedings and then applied to have his recognizance vacated, and served the petition on the plaintiff, who did not appear, the court declined to order the recognizance to be vacated at once, but directed the plaintiff to be served with notice that an order vacating the recognizance would be made on a certain day, unless he should show cause to the contrary (x).

Surety
paying for
receiver

If a surety has been called upon to pay anything on

(s) *Walker v. Wild*, 1 Madd. 528; *Re Graham*, *Graham v. Noakes* [1895], 1 Ch. 66, at p. 70; Dan. Ch. Pr. 7th ed. p. 1456. As to notice of motion on summons by surety to stay actions on the recognizance,

see Dan. Ch. Forms, 5th ed.

(t) *Walker v. Wild*, 1 Madd. 528.

(u) *Ib.*

(x) *Mann v. Stennett*, 8 Beav. 189.

account of the receiver, he is entitled to be indemnified for what he has so paid out of any balance which may be coming to the receiver in the action. Therefore, where a receiver had borrowed money from his surety for the purpose of making sundry necessary payments, it was held that the surety was entitled to be repaid the amount which he had lent to the receiver out of a balance in court due to the receiver (*y*). Upon the same principle, some shares belonging to a receiver in property which was being administered by the court were held liable to make good to his sureties a sum of money which they had been obliged to pay in consequence of his default, although those shares were not included in a security which the receiver had given to the sureties by way of indemnity (*z*).

A surety who pays the debt of his principal has the same right against his co-surety as he has against the principal, and he will be permitted to put the recognizance in suit as against his co-surety (*a*).

Right of
surety who
has paid
to enforce
recog-
nizance
against
co-surety

(*y*) *Glossup v. Harrison*, 3 V. D. & J. 524, at pp. 530, 531.
& B. 134; Coop. 61.

(*a*) *Re Swan's Estate*, Ir. R. 4

(*z*) *Brandon v. Brandon*, 3 Eq. 209.

CHAPTER XIII.

MANAGERS AND CONSIGNEES.

Chap. XIII. WHERE a receiver is required for the purpose not only
Manager. of receiving rents and profits, or of getting in outstanding property, but of carrying on or superintending a trade, business, or undertaking, he is called a manager, or more usually a receiver and manager. The appointment of a manager implies that he has power to deal with the property over which he is appointed manager and to appropriate the proceeds in a proper manner (a).

In what cases appointed. Where the court appoints a manager of a business or undertaking, it in effect takes the management of it into its own hands; for the manager is the servant and officer of the court, and upon any question arising as to the character or details of the management, it is for the court to direct and decide. Managers, when appointed by the court, are responsible to the court, and no orders of any of the parties interested in the business of which they are appointed managers can interfere with this responsibility. The court will not assume the management of a business or undertaking, except with a view to the winding-up and sale of it. The management is an interim management: its necessity and its justification spring out of the jurisdiction to liquidate and sell: the business or undertaking is managed and continued in

(a) *Sheppard v. Owenford*, 1 648, 653; *Truman v. Redgrave*,
K. & J. 500; *Re Manchester and* 18 Ch. D. 547.
Milford Railway Co., 14 Ch. D.

order that it may be sold as a going concern, and with the sale the management ends (*b*). The court will, however, appoint a person to manage the business of a testator pursuant to the trusts of his will, although no sale or winding-up is contemplated, for instance, where the legatee of the business is an infant (*c*).

The court has also jurisdiction, upon interlocutory application, to authorise a receiver to exercise such powers of management as are necessary for the preservation of property, which is the subject of litigation, and to which the applicant has made out a *prima facie* title (*d*). Thus, where the application was made by a lessor in an action to recover possession of a licensed hotel, the lease of which contained covenants by the lessee to keep the premises continuously open as an hotel and not to endanger the licences, the court, being satisfied that the licences were in jeopardy owing to threats by the defendant lessee to close the hotel, appointed a receiver, directed the licences to be handed over to him, and authorised him to keep the premises open as an hotel, and to do all acts necessary to preserve the licences (*e*). In such cases the receiver is not given general powers of management, but such powers only as are necessary to preserve the property.

(*b*) *Gardner v. L. C. & D. Ry. Co.*, L. R. 2 Ch. App. 211, 212, per Lord Cairns; *Whitley v. Challis* [1892], 1 Ch. p. 69; *Re Newdigate Colliery Co.* [1912], 1 Ch. p. 472. In *Peck v. Transmaran Iron Co.*, 2 Ch. D. 115, foreclosure only seems to have been asked for; see also pp. 46, 120.

(*c*) See *Re Irish*, 40 Ch. D. 49.

(*d*) *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79; see especially judgment of Farwell, L.J.; *Charrington v. Camp* [1902], 1 Ch. 386; and see R. S. C. Ord. L. r. 3.

(*e*) *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79; see this case as to form of order.

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A manager may be appointed to carry on a private trade or business with a view to effecting a sale or winding-up for the benefit of the persons interested. Thus, a manager was appointed to carry on the business of an intestate, there being no existing representative of his estate (*f*). Where trustees have to manage a business, but are not themselves qualified to do so, and cannot agree in appointing a manager, the court will appoint a receiver and manager of the business (*g*).

Partner-
ship.

The court has jurisdiction to appoint a manager of a partnership business, with a view to winding it up or selling it as a going concern (*h*), and notwithstanding that the partnership has expired pursuant to a provision contained in the partnership deed (*i*). The appointment is made for the purpose of preserving the assets and nothing more: the court does not intend to throw any liabilities of an onerous nature upon the partners (*k*).

Lunacy.

The court in Lunacy may authorise the committee or receiver of the estate of a lunatic to carry on the trade or business of the lunatic (*l*). The person so authorised is, for the purpose of estimating his liability to persons dealing with him, the agent of the lunatic (*m*).

Bank-
ruptcy.

By section 12 (1) of the Bankruptcy Act, 1883 (46 & 47

(*f*) *Steer v. Steer*, 2 Dr. & Sm. 311; see also *Blackett v. Blackett*, 19 W. R. 559; *Spencer v. Shaw*, W. N. 1875, 115; *Re Wright*, 32 S. J. 721; as to manager of a newspaper see *Chaplin v. Young*, 6 L. T. 97.

(*g*) *Hart v. Denham*, W. N. 1871, 2, per Lord Romilly, M.R.

(*h*) See also pp. 91, 102, *ante*.

(*i*) *Taylor v. Neate*, 39 Ch. D.

538.

(*k*) Per Chitty, J., in *Taylor v. Neate*, 39 Ch. D. at p. 545. See also *Boehm v. Goodall* [1910], 1 Ch. 155.

(*l*) Lunacy Act, 1890 (53 Vict. c. 5), ss. 116, 120; and Lunacy Act, 1908 (8 Edw. 7, c. 47), s. 1.

(*m*) *Plumpton v. Burkinshaw* [1908], 2 K. B. 572.

Vict. c. 52) the official receiver, while acting as interim receiver of the debtor's estate may, on the application of any creditor, appoint a special manager to act until a trustee is appointed (*n*). This section enables the official receiver to appoint a special manager while acting as interim receiver under section 10, prior to a receiving order (*o*). Even if the petition is dismissed the special manager is entitled to be paid his expenses properly incurred and his remuneration out of his receipts; the debtor cannot impugn any acts done by the manager in the proper conduct of the business (*p*). Chap. XIII.

The court will appoint a manager upon the application of incumbrancers whose securities includes the goodwill (*r*); but unless the goodwill is included a receiver only will be appointed (*s*); though he may it seems be given such powers of management as are necessary to preserve the property actually comprised in the security (*t*). Mortgages (*q*).

The legal mortgagees of an hotel, whose security comprised the trade fixtures, goodwill and business obtained upon interlocutory motion the appointment of a manager of the business of a licensed victualler carried on in it (*u*).

(*n*) As to practice, see Bankruptcy Rules 331, 342—4. The official receiver has absolute discretion as to whether or not he will make the appointment and no appeal lies; *Re Whitaker*, 1 Mor. 36.

(*o*) See s. 70 as to powers of interim receiver after receiving order.

(*p*) *Re A. B. & Co. (No. 2)* [1900], 2 Q. B. 429; *Re A Bankruptcy Petition*, 7 Mans. 132. Accounts may be enforced under

s. 102 (5); see *Re Jones* [1908], 1 K. B. 204.

(*q*) As to managers appointed under powers of an instrument, see Chap. XIV.

(*r*) *Truman v. Redgrave*, 18 Ch. D. 547.

(*s*) *Whitley v. Challis* [1892], 1 Ch. 64; *Re Leas Hotel* [1902], 1 Ch. 332.

(*t*) Upon the principles illustrated in *Leney & Sons, Ltd. v. Callingham* [1908], 1 K. B. 79.

(*u*) *Truman v. Redgrave*, 18

Chap. XIII. So a manager has been appointed at the instance of holders of a registered statutory mortgage of a steamship (*x*); of collieries held under a lease containing working covenants (*y*); and on the application of the unpaid vendor of the property of a company in liquidation (*z*). In order that the goodwill may be included in the security it need not be expressly mentioned: thus, where debentures issued by an hotel company charged "all its property and effects whatsoever," it was held that the goodwill of the business was included under the expression "property" and a manager was appointed on the application of the plaintiff in a debenture holders' action (*a*).

Companies. The appointment of a manager is very frequently made over the undertaking of an ordinary limited company, on the application of mortgagees or debenture holders whose security includes the goodwill (*b*). Formerly the court felt considerable hesitation about appointing a manager of the business of a limited company (*c*), but it is now well settled that the court will readily make the appointment in order to enable a beneficial realisation of the property comprised in the security to be effected (*d*): for the appointment of a receiver only,

Ch. D. 547; see this case for form of order. See also *Ind, Coope & Co. v. Mee*, W. N. 1895, 8.

(*x*) *Fairfield, &c., Co. v. London and East Coast S.S. Co.*, W. N. 1895, 64.

(*y*) *Campbell v. Lloyds Bank*, 58 L. J. Ch. 424; *County of Gloucester Bank v. Rudry Coal Co.* [1895], 1 Ch. 629.

(*z*) *Boyle v. Bettors Llantwit Co.*, 2 Ch. D. 726.

(*a*) *Re Leas Hotel Co.* [1902], 1 Ch. 332.

(*b*) See *Re Leas Hotel Co.* [1902], 1 Ch. 332, 334, and *ante*, p. 78.

(*c*) *Makins v. Peter Ibbotson & Co.* [1891], 1 Ch. 133.

(*d*) See *Edwards v. Rolling Stock Syndicate* [1893], 1 Ch. 574; *Re Victoria Steamboats* [1897], 1 Ch. 158; *Re Leas Hotel Co.* [1902], 1 Ch. 332; and

without powers of management must inevitably cause the destruction of the goodwill, which cannot therefore be preserved for the benefit of the persons who have a charge upon it unless a manager is appointed (*e*). Where three sets of debentures had been issued, each of which created a charge on certain specific items in addition to a general floating charge, the court appointed a receiver in each of three actions brought by the different sets of debenture holders, and appointed the receiver for the first debenture holders' manager (*f*).

A manager is appointed for a definite period, usually of from one to six months; if a realisation has not been effected at the expiration of that period application must be made to the court to continue the appointment.

Where the official receiver becomes the liquidator of a company whether provisionally or otherwise, he may, if satisfied that the nature of the estate or business of the company, or the interests of the creditors or contributors generally require the appointment of a special manager, other than himself, apply to the court to, and the court may on such application, appoint a special manager thereof, to act during such time as the court may direct, with such powers, including any of the powers of a receiver or manager, as may be entrusted to him by the court (*g*).

see *Re Ryland's Glass and Engineering Co.*, 118 L. T. Jo. p. 87. For form of order see Seton, 7th ed. p. 735.

(*e*) It may be observed also that debenture holders cannot cause their security, when it is a floating charge, to crystallize without enforcing their rights against everything included in

the charge (*Evans v. Rival Granite Quarries* [1910], 2 K. B. 979), and that where the goodwill forms part of their security they cannot effectually enforce their security against it unless they can obtain a manager.

(*f*) See *Re Ind, Coope & Co.* [1911], 2 Ch. 223.

(*g*) Companies (Cons.) Act,

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Practice on appointment.

Power to appoint special manager in winding-up cases.

Chap. XIII.

The preceding chapters of this book relative to the practice on the appointment of receivers and to its consequences are equally applicable where the receiver is appointed manager, with the exceptions mentioned below. The topics dealt with in the earlier chapters are therefore treated here so far as they apply to managers only.

Effect of
appoint-
ment of
manager.

The appointment of a receiver and manager over the assets and business of a company does not dissolve or annihilate the company, any more than the taking possession by the mortgagee of the fee of land let to tenants annihilates the mortgagor. Both continue to exist; but it entirely supersedes the company in the conduct of its business, deprives it of all power to enter into contracts in relation to that business, or to sell, pledge or otherwise dispose of the property put into the possession or under the control of the receiver and manager. Its powers in this respect are entirely in abeyance (*h*).

It is the duty of the receiver and manager, subject to any special directions of the court, to carry on the business according to the general course adopted by the particular trade: he must not speculate (*i*). In the case of *Moss S.S. Co. v. Whinney* (*k*), the effect of certain transactions of a receiver and manager gave rise to much difference of judicial opinion. Whinney was the receiver and manager appointed in a debenture holders' action of

1908 (8 Edw. 7, c. 69), s. 161
(1).

(*h*) *Per* Lord Atkinson in
Moss S.S. Co. v. Whinney [1912],
A. C. p. 263.

(*i*) *Taylor v. Neate*, 39 Ch. D.
p. 544; see *Re British Power, &c.*,

Co. [1907], 1 Ch. 528.

(*k*) [1912], A. C. 254, affirming
decision of the majority of the
C. A. (Moulton, L.J., diss.),
which reversed the decision of
Hamilton, J.

the undertaking of Ind, Coope & Co., Ltd., a firm of brewers. Chap. XIII.

By a letter signed "Ind, Coope & Co., per A. Whinney, receiver and manager" he requested the appellants, a steamship company, to convey a quantity of beer to Malta consigned to Ind, Coope & Co. c/o its local agents. The appellants accordingly carried the beer under a bill of lading, in which the consignee was described as Ind, Coope & Co., and which contained a provision that the appellants were to have a lien on the beer shipped, not only for the freight in respect thereof, but also for any previously unsatisfied freight due from the shippers or consignees. It was held by the majority (*l*) of the House of Lords that the appellants were not entitled to a lien on the beer shipped for unsatisfied freight due in respect of beer shipped by Ind, Coope & Co. prior to the appointment of the receiver and manager; the decision proceeded mainly on the ground that, as the appellants were cognisant of the appointment of the receiver and manager, they must be taken to have known that all the powers of the company were paralysed, and could only be exercised by the receiver as principal, and consequently that the receiver and not the company was the shipper and consignee and the bill of lading was to be read accordingly. Several of their lordships (*m*) expressed the opinion that whether or not the creation of such a lien would have been *ultra vires* the receiver he could not himself have claimed the goods without satisfying the lien, though, assuming him to have acted *ultra vires*, the

(*l*) Lords Loreburn, Halsbury, Atkinson, and Ashbourne, Lords Shaw and Mersey, diss.

(*m*) Lords Loreburn, Shaw, and Mersey. Lord Atkinson considered that the receiver had

no power to create such a lien and was not estopped from asserting that he had acted *ultra vires* and so claiming the goods.

Chap. XIII. company, or possibly the debenture holders, might have done so (*n*).

Duty of
manager in
respect to
contracts
entered
into before
his ap-
pointment.

The duty of a manager appointed of the business of a company, with respect to contracts entered into by the company before his appointment differs from that of a person who is simply appointed receiver of the assets. Such contracts, unless they are contracts of employment (*o*), remain valid and subsisting notwithstanding the appointment of a receiver or manager. Any breach of them will render the company, not the manager, liable in damages, and will, moreover, destroy the goodwill of the business. Now a receiver appointed over the assets without any power to carry on the business is under no obligation and has no power to carry out these contracts or to have regard to preserving the goodwill (*p*). But a manager is in a different position; the goodwill forms part of the property entrusted to his charge, and it is his duty to preserve it, as well as the rest of the assets for the benefit of all parties interested. He is the officer of the court owing a duty both to the company and the debenture holders; he must not, therefore, disregard contracts in order to benefit the debenture holders, since this course would both destroy the goodwill and render the company liable in damages (*q*). If, however, it can be shown that to fulfil the contracts will benefit neither the company nor the

(*n*) *Quere*, whether a lien created by a receiver and manager pursuant to the usual course of trading in similar businesses, to secure a liability incurred by him as such receiver and manager would not be valid, even against the company and

the debenture holders.

(*o*) See *post*, p. 310.

(*p*) See *ante*, p. 248.

(*q*) *Re Newdigate Colliery Co.* [1912], 1 Ch. 468; see also *Re Marriage, Neave & Co.* [1896], 2 Ch. p. 672; and *Moss S.S. Co. v. Whinney* [1912], A. C. p. 262.

debenture holders, the court will, on the application of the receiver, allow him to refrain from carrying them into effect (*r*). The same principles apply to managers of a private business appointed at the instance of mortgagees. Chap. XIII.

The above principles were illustrated in a case in which the Court of Appeal refused to allow the manager appointed over the undertaking and assets of a colliery company to disregard contracts which had been entered into for the forward supply of coal, although, owing to a rise in price, this course would have enabled the manager to obtain enhanced receipts to the extent of 200*l.* a week(*s*). In a subsequent case a company had contracted to construct for 60,000*l.* certain ships which were unfinished at the date of the appointment of the receiver and manager, and in respect of which 20,000*l.*, part of the purchase price had then been paid on account: the company had given to a bank a charge, which ranked in priority to the debentures, to secure 40,000*l.* on the ships and the unpaid balance of 40,000*l.* to be received under the contract; it was proved that the cost of completing the ships would amount, without profit, to 50,000*l.* In these circumstances, the court refused to sanction a borrowing by the receiver and manager for the purpose of completing the ships, and authorised him to discontinue work upon them, on the ground that no benefit would accrue either to the company or the debenture holders from the completion of the contract, and that in the circumstances it was not shown that the goodwill would be injured (*t*).

(*r*) *Re Thames Ironworks*, [1912], 1 Ch. 468.
W. N. 1912, 66; 106 L. T. 674.

(*t*) *Re Thames Ironworks*,
(*s*) *Re Newdigate Colliery Co.* W. N. 1912, 66; 106 L. T.

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If a receiver and manager continues to supply goods for which a contract had been entered into by the company before his appointment, he can only recover for the goods supplied by him, subject to the right of the defendant to set off all claims arising out of the same transaction (*u*).

Effect of
appoint-
ment on
contracts
of service.

It was held in *Reid v. Explosives Co.* (*x*) that the appointment by the court of a receiver and manager operated to dismiss the company's servants. In a recent case (*y*), Moulton, L.J., on the ground that the appointment of a receiver and manager has no effect on the contracts of the company in general, expressed the opinion that the decision in *Reid v. Explosives Co.* did not, as has been generally supposed (*z*), establish the general proposition, but was decided on the special facts of the case. It is, however, suggested that the view that the appointment of a receiver and manager operates to

674. Money had already been borrowed to enable other contracts to be completed; *quare*, whether the court was bound to regard the interests of the bank.

(*u*) *Forster v. Nixon's Navigation Co., Ltd.*, 23 T. L. R. 138, where the person to whom the receiver had, in breach of the company's contract, discontinued to supply pit props, was held entitled to set off the difference between the contract and market prices of the undelivered props against a claim by the receiver for the price of those supplied by him.

(*x*) 19 Q. B. D. 264. As to

the position of directors see *Welstead v. Hadley*, 21 T. L. R. 169; *Measures Bros., Ltd. v. Measures* [1911], 2 Ch. 248.

(*y*) In *Whinney v. Moss S.S. Co.* [1910], 2 Ch. p. 826, this was a dictum unnecessary for the actual decision in a dissenting judgment, the decision of the majority of the C. A. being affirmed by the House of Lords, *Moss S.S. Co. v. Whinney* [1912], A. C. 254.

(*z*) See *Midland Counties Bank v. Attwood* [1905], 1 Ch. p. 362; *Measures Bros., Ltd. v. Measures* [1910], 1 Ch. p. 344, *per* Joyce, J., and [1910] 2 Ch. 261, *per* Kennedy, L.J.

dismiss servants is to be supported on the ground that contracts of service differ from the generality of contracts in being unassignable(*a*); for the appointment of a receiver and manager, though it leaves the company a subsisting entity, renders it incapable of carrying on its business, in the conduct of which it is superseded by the receiver and manager, who is not an agent but a principal(*b*), and therefore practically in the position of an assignee(*c*): if this is so, contracts of service cannot be enforced by or against him(*d*). It would seem to follow that if the receiver and manager continues to employ the servant, this is under a fresh contract and does not effect a waiver of the breach of the contract with the company(*e*).

A covenant restricting the servant's employment after the termination of the service cannot be enforced when the appointment of a receiver has operated to dismiss the

(*a*) See *Brace v. Calder* [1895], 2 Q. B. 253.

(*b*) See *Moss S.S. Co. v. Whinney* [1912], A. C. pp. 259, 262.

(*c*) See *Forster v. Nixon's Navigation Co.*, 23 T. L. R. 138.

(*d*) The servant can claim against the company for breach of contract or wrongful dismissal (see *Measures Bros., Ltd. v. Measures* [1910], 1 Ch. p. 344). But if the receiver has continued to employ him at the same or larger wages for the residue of his term of service, the damages would only be nominal; see *Brace v. Calder* [1895], 2 Q. B. p. 261.

(*e*) See *Reid v. Explosives Co.*, 19 Q. B. D. p. 268; see also *Re*

English Joint Stock Bank, 3 Eq. 341; *Re Forster*, 19 L. R. Ir. 240. If this were not so, it seems that such servants would have to claim *pari passu* with ordinary creditors in respect of services rendered after the receiver's appointment; for s. 107 of the Companies (Cons.) Act, 1908, only applies to give a preference in respect of services rendered before the appointment, and in the case supposed the servant could not claim against the receiver, nor by subrogation against the assets, as the receiver is not liable under the company's contracts; *Re Newdigate Colliery Co.* [1912], 1 Ch. p. 474.

Chap. XIII. servant before the expiration of the term for which he was engaged (*f*).

It would seem that where debenture holders appoint a receiver and manager under the terms of an instrument by which the receiver becomes agent for the company, no dismissal of servants is effected, as the employer remains the same; *secus*, where the receiver becomes agent for the debenture holders (*g*).

Liability of
managers.

Receivers and managers appointed by the court, except those appointed in lunacy (*h*), are personally liable to persons dealing with them in respect of liabilities incurred in carrying on the business with a correlative right to be indemnified out of the assets in respect of such payments as they have made in discharge of liabilities properly incurred (*i*); for they are not agents for any person but principals (*k*), and are therefore assumed to pledge their personal credit. Their liability will not be displaced by the fact that in giving orders they sign as "receiver and manager" (*l*).

This principle, however, does not operate to render the receiver and manager personally liable in respect of sums

(*f*) See *Measures Bros., Ltd. v. Measures* [1910], 2 Ch. 248; and *General Bill Posting Co. v. Atkinson* [1909], A. C. 118.

(*g*) See *Deyes v. Wood* [1911], 1 K. B. 806; Lindley on Companies, 6th ed. p. 333, and p. 343, *post*.

(*h*) *Plumpton v. Burkinshaw* [1908], 2 K. B. 572.

(*i*) *Burt, Boulton and Hayward v. Bull* [1895], 1 Q. B. 276; *Strapp v. Bull, Sons & Co.* [1895], 2 Ch. 1; *Re Glasdir Copper*

Mines [1906], 1 Ch. 365; *Moss S.S. Co. v. Whinney* [1912], A. C. pp. 259, 270, 271. This principle would apply to render them personally liable under the Workmen's Compensation Act, 1906.

(*k*) *Re Glasdir Copper Mines* [1906], 1 Ch. p. 378; *Whinney v. Moss S.S. Co.* [1912], A. C. 254.

(*l*) *Burt, Boulton and Hayward v. Bull* [1895], 1 Q. B. 276.

which have been advanced pursuant to an order of the court, making repayment of such sums a charge on the assets (*m*), whether such sums are advanced by a party to the action or a stranger (*n*). Chap. XIII.

Where a committee or receiver in lunacy is by an order made in lunacy authorised to manage the business of the lunatic, he is not personally liable to creditors in respect of liabilities which he has incurred in carrying on the business, unless he expressly or impliedly pledges his own credit, for he is regarded as agent for the lunatic (*o*).

Similarly receivers and managers appointed by debenture holders or mortgagees under the powers of an instrument are not personally liable to persons dealing with them with knowledge of their position; for they are agents for the mortgagor or mortgagee according to circumstances (*p*).

A receiver and manager is entitled to be indemnified out of the assets against all liabilities properly incurred (*q*) by him in carrying on the business (*r*); he is entitled to this indemnity (in addition to the rest of his costs, charges, expenses, and remuneration) in priority to all other claims against the assets (except the plaintiff's costs of realisation (*s*)), even to the claims of persons who have

Right to
indemnity.

(*m*) *Re A. Boynton, Ltd.* (No. 2) [1907], 1 Ch. 528.
[1910], 1 Ch. 519.

(*n*) *Re Glasdir Copper Mines* 75, 79; *Strapp v. Bull, Sons & Co.* [1895], 2 Ch. 1; *Re Glasdir Copper Mines* [1906], 1 Ch. 365;
[1906], 1 Ch. p. 384; *Re A. Boynton, Ltd.* [1910], 1 Ch. 519.

(*o*) *Plumpton v. Burkinshaw* [1908], 2 K. B. 572. *Whinney v. Moss S.S. Co.* [1912], A. C. p. 270; and see *Re Brooke* [1894], 2 Ch. 600.

(*p*) See *post*, p. 343, where this topic is further discussed.

(*q*) See *Re British Power, &c., Co.* [1906], 1 Ch. 497; *ib.* *Re London United Breweries* [1907], 2 Ch. 511.

Chap. XIII. advanced money to enable the business to be carried on, under an order of the court declaring the repayment of such advances a first charge on the assets (*t*), and in priority to the costs of the action (*u*). The receiver may waive his rights in this respect, but waiver will not be implied except in a plain case (*x*).

Even where a receiver and manager has borrowed the whole of a specified sum which he has been authorised to raise for the general purposes of the business upon the security of a charge on the assets, he will be allowed an indemnity in respect of such further liabilities as he can, in the circumstances, justify as having been properly incurred. It is not, however, enough to show that the additional liabilities were incurred in the ordinary course of business, for it is *primâ facie* the duty of the receiver and manager to obtain the leave of the court before incurring liabilities in excess of the sum specified; thus a receiver and manager of a motor car business, who had exercised to the full extent a power given to him of borrowing a specified sum, was allowed indemnity in respect of the cost of supplying bodies of cars which had been ordered, and of the rent of business premises, but not in respect of the cost of cars for exhibition at a show, for this was a speculation; nor of an overdraft for sums employed in carrying on the business, because

(*t*) *Strapp v. Bull, Sons & Co.* [1895], 2 Ch. 1; *Lathom v. Greenwich Ferry*, 72 L. T. 790; *Re Glasdir Copper Mines* [1906], 1 Ch. 365; *Re A. Boynton* [1910], 1 Ch. 519. The order ought, however, to state whether the charge is to be subject to the receiver's right of indemnity or

not; see *Re Glasdir Copper Mines*, *supra*.

(*u*) *Batten v. Wedgwood Coal Co.*, 28 Ch. D. 317; *Re London United Breweries* [1907], 2 Ch. 511.

(*x*) See *Re Glasdir Copper Mines* [1906], 1 Ch. 365.

leave to incur this liability might and should have been obtained from the court (*y*). Chap. XIII.

This extent of this right to indemnity is limited to the amount of the assets; a receiver and manager of a partnership business who had made payments in excess of the assets was not allowed to claim indemnity from the partners in respect of such excess, although he had been appointed under a consent order (*z*).

Where a receiver and manager has properly incurred liabilities in the discharge of his duties, his creditors, in the event of his failure to pay them, are entitled to claim against the estate direct (*a*); if the receiver and manager has become bankrupt, payment will be ordered direct to the creditors, not through the receiver's trustee in bankruptcy (*b*). This right of the creditors to claim against the assets is limited to the amount of the receiver's indemnity; thus where a receiver and manager had properly incurred liabilities to trade creditors to the extent of 900*l.* in respect of which he was entitled to indemnity, but which remained unpaid, and was in default to the estate to the extent of 400*l.*, it was held that the creditors could only claim against the assets to the extent of the receiver's net indemnity, *i.e.*, 500*l.*; and that, therefore, as the estate would suffer no loss by the receiver's default, his sureties could not be compelled by the creditors to make good the 400*l.* by which he was in default; the creditors therefore had no remedy, except their claim against the receiver personally, in respect of

Right of
creditors
of receiver
who makes
default.

(*y*) *Re British Power, &c.*, (No. 2) [1907], 1 Ch. 528; *Re Co.* (No. 2) [1907], 1 Ch. 528. *London United Breweries* [1907],

(*z*) *Boehm v. Goodall* [1911], 2 Ch. 511.
1 Ch. 155.

(*a*) *Re British Power, &c.*, [1907], 2 Ch. 511.
Co. [1906], 1 Ch. 497; and *ib.*

(*b*) *Re London United Breweries*

Chap. XIII. the 400*l.* (c). In an earlier case (d) the facts were somewhat similar, except that the sureties had paid into court the sum by which the receiver and manager was in default without contesting their liability; the court accordingly directed payment to be made direct to the creditors of the receiver and manager, who had become bankrupt, of full amount of their debts; the learned judge expressed the opinion that as the receiver was an officer of the court, the court would see that the debts of creditors to whom he had become indebted, in the course of a proper management of the estate, were satisfied by the receiver himself, or if he became bankrupt, or if other reasons rendered it advisable, by payment direct to the creditors to the extent of the assets under the control of the court. The judgment must be read in light of the fact that, as the learned judge pointed out, the estate would suffer no loss because the sureties paid the amount of the deficiency; it cannot therefore be considered to conflict with the principles enunciated in the later case above cited (e).

Borrowing
by
manager.

If a receiver and manager requires money to enable him to carry on the business entrusted to him, the court will give him liberty to borrow upon the security of the property in his control and as a first charge upon the whole undertaking, in priority even to debentures, if the money is necessary for the preservation of the assets and the goodwill (f); leave will not, however, be given if

(c) *Re British Power, &c., Co.* [1910], 2 Ch. 470; see *Re Johnson*, 15 Ch. D. 548.

(d) *Re London United Breweries* [1907], 2 Ch. 511.

(e) *Re British Power, &c., Co.* [1910], 2 Ch. 470, *supra*.

(f) *Greenwood v. Algeciras Railway Co.* [1894], 2 Ch. 205; *Securities and Properties Corporation v. Brighton Alhambra*, 62 L. J. Ch. 566; and see *Re Glasdir Copper Mines* [1906], 1 Ch. 365; *Re British Power, &c.,*

the borrowing will not benefit either the company or the debenture holders (*g*). Chap. XIII.

Where a receiver and manager appointed in a debenture holders' action has been authorised to raise money, this gives him by implication power to create a charge to secure the money in priority to existing debentures. In order to secure the money raised the receiver sometimes gives a certificate, sometimes a charge; or the amount may be raised on the security of debentures (*h*). In a case where the receiver was authorised to borrow 700*l.* and, not requiring all the money at once, overdrawed 500*l.* from the bank and afterwards paid off the overdraft, it was held that he had not exhausted his borrowing powers to the extent of 500*l.*, but was still able to borrow the entire 700*l.* without further leave (*i*).

The claim of persons who have advanced money to receivers and managers under an order of the court upon security of a charge on the assets, is, unless the order otherwise directs, postponed to the receiver's right to his costs, charges and expenses (*k*), including remuneration (*l*), and to plaintiff's costs of realisation (*m*). The receiver will not be deemed to have waived his rights in this Co. [1906], 1 Ch. 497. The order ought to state whether the charge is to be subject to the receiver's right to indemnity or not; see *Re Glasdir Copper Mines* [1906], 1 Ch. 365; see, for form of order, Seton, 7th ed. p. 764.

(*g*) See *Re Thames Ironworks*, W. N. 1912, 66; 106 L. T. 674, and *ante*, p. 309.

(*h*) See Palmer's Company Precedents, Part III., 10th ed., Ch. 68, and p. 633 for form of

certificate.

(*i*) *Milward v. Avill and Smart*, W. N. 1897, 162.

(*k*) *Strapp v. Bull, Sons & Co.* [1895], 2 Ch. 1; *Re Glasdir Copper Mines* [1906], 1 Ch. 365; *Re A. Boynton* [1910], 1 Ch. 519.

(*l*) *Re Glasdir Copper Mines* [1906], 1 Ch. 365. As to extent to which receiver is entitled to claim indemnity, see *ante*, p. 313.

(*m*) *Re A. Boynton* [1910], 1 Ch. p. 525.

Chap. XIII. respect except in a plain case (*n*); he is under no personal liability for the sums advanced (*o*).

Interference with manager (*p*).

Any deliberate act calculated to destroy property under the control of the court by means of a receiver and manager, will be restrained, although it does not induce the breaking of any contract. The object of the court is to prevent any undue interference with the administration of justice, and when anyone, whether a partner in a business, a party to the litigation, or a stranger, interferes with an officer of the court, it is essential for the court to protect that officer; and in this connection it must be remembered that in the case of a manager the property entrusted to him includes the goodwill. Inducing employees to leave a business which is being carried on under the direction of the court, with a view to their employment in another business which is being started in opposition, and attempting to obtain a tenancy of a field, which, to the knowledge of the person making the attempt, had been occupied in connection with the business, are such acts of interference and will be restrained by injunction (*q*). Deliberate acts of interference are a contempt of court and may be punished as such (*r*); it is such an act of interference for one of the partners in the original business to start or conduct a competing business in such a way as to improperly injure the original business when under the control of the court, as for instance by repre-

(*n*) *Re Glasdir Copper Mines* [1906], 1 Ch. 365.

(*o*) *Re A. Boynton* [1910], 1 Ch. 519.

(*p*) See, further, Chapter VI.

(*q*) *Dixon v. Dixon* [1904], 1 Ch. 161. The acts complained of were done by the defendant

to the action who had been a party to the action. Acts of *bonâ fide* trade competition by strangers would not be restrained, although their effect might destroy the goodwill.

(*r*) *Taylor v. Soper*, 62 L. T. 828.

senting by circulars that the latter business is no longer carried on (s). Chap. XIII.

A receiver and manager, being an officer of the court, must not place himself in a position in which his interest will conflict with his duty ; accordingly, where a receiver and manager had been appointed over the undertaking of a railway company, it was held that he must not enter into partnership with the company and use his own steamboat in conjunction with the company's traffic by issuing through tickets for use on the steamboat and the company's railway (t). Interest of manager must not conflict with his duty.

Although the court will, in the case of a private trade or business, appoint a manager, the case is different where a company has been incorporated, and empowered by the Legislature, acting for the public interest, to construct and maintain an undertaking for a public purpose, and the Legislature has imposed powers and duties of an important kind on the company. Inasmuch as these powers and duties have been conferred and imposed on the company and on no other body of persons, the powers must be executed and the duties discharged by the particular company : they cannot be delegated or transferred. Public company. Accordingly, although the court may appoint a receiver, it will not appoint a manager of the undertaking of such a company at the instance of a debenture holder ; inasmuch as what a debenture, in the form scheduled to the Companies Clauses Consolidation Act, 1845 (by which companies of the kind under consideration are regulated), gives is only a charge on the company's undertaking, which charge is not to interfere with the carrying on the business of the company, and no right is given to sell

(s) *King v. Dobson*, 56 S. J. 51. (t) *Re Eastern and Midland Railway Co.*, 90 L. T. Jo. 20.

Chap. XIII. the undertaking (*u*). Upon this ground the court will not appoint a manager of a tramway company governed by the Tramways Act, 1870 (*x*), and it would not formerly appoint a manager of a railway company (*y*).

Railway
company.

Now, however, under the provisions of the Railway Companies Act, 1867 (30 & 31 Vict. c. 127), s. 4, made perpetual by the Act 38 & 39 Vict. c. 31, a creditor who has recovered judgment against a railway company may obtain the appointment not only of a receiver, but also, if necessary, of a manager of the undertaking of the company, on application by petition in a summary way to the Chancery Division of the High Court (*z*).

Whether the court has jurisdiction, under this 4th section, to appoint a receiver of a railway company's undertaking before the railway has been opened for public traffic, is a question which, in a recent case (*a*), the Court of Appeal left undecided: but, assuming that the jurisdiction exists, the court will be disinclined to

(*u*) *Gardner v. London, Chatham and Dover Railway Co.*, L.R. 2 Ch. App. 201, at pp. 212, 215—217, *per* Lord Cairns; *Blaker v. Herts and Essex Waterworks Co.*, 41 Ch. D. 399.

(*x*) *Marshall v. South Staffordshire Tramways Co.* [1895], 2 Ch. 36, disapproving *Bartlett v. West Metropolitan Tramways Co.* [1893], 3 Ch. 437; [1894], 2 Ch. 286.

(*y*) *Gardner v. London, Chatham and Dover Railway Co.*, L.R. 2 Ch. App. 201.

(*z*) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645; *Re*

East and West India Docks Co., 38 Ch. D. 576; *Re Eastern and Midlands Railway Co.*, 45 Ch. D. 367. As to form of order, see Seton, 7th ed. pp. 736, 756.

(*a*) *Re Knott End Railway Act*, 1898 [1901], 2 Ch. 8, explaining *Re Manchester and Milford Railway Co.*, *ubi supra*. In the *Knott End* case, Rigby, L.J., expressed the opinion (doubted, however, by Vaughan Williams, L.J.) that if, before the opening of a railway for traffic, a receiver were appointed and put in possession of chattels of the railway company, the court would,

exercise it, where there is no immediate prospect of there being anything for a receiver to receive (*b*). Chap. XIII.

Where a receiver and manager appointed at the instance of a judgment creditor is already in possession of a railway company's undertaking, another receiver and manager will not be appointed on the application of another judgment creditor (*c*).

In exercising its jurisdiction under the Act of 1867, the court will take into consideration the present position and exigencies of the railway company, and will act for the general benefit of all the creditors (*d*).

As a general rule, in cases under the Act of 1867, the directors or secretary of the company, or some of those persons, will be appointed by the court to be managers, where they are acting fairly, and the order for the appointment of a manager will be made without prejudice to any application on the part of the directors to propose themselves, or some of their number, to act as managers (*e*).

The only evidence required, in support of an application by a judgment creditor, under section 4 of the Act of 1867, for the appointment of a manager, is an affidavit that he is a judgment creditor, that his judgment debt is unsatisfied, and that the company is a going concern, carrying on its own business and conducting its own traffic in the ordinary way (*f*).

Although a receiver may be appointed of the tolls of a Manager of
market, &c.
on the application of a judgment creditor, order the receiver to relinquish possession.

Railway Co., 40 Ch. D. 119; 57 L. T. 82.

(*e*) *Re Manchester and Milford Railway Co.*, 14 Ch. D. 645.

(*b*) *Ib.*
(*c*) *Re Mersey Railway Co.*, 37 Ch. D. 610.

(*f*) *Re Manchester, &c., Railway Co.*, 14 Ch. D. 645.

(*d*) *Re Hull, Barnsley, &c.*,

K.R.

Chap. XIII. market, the court will not appoint a manager of a market belonging to a municipal corporation and regulated by statute, because this would amount to an administration of the affairs of a corporation (*g*).

Manager of
property
abroad.

Where an action relates to property in a colony or in a foreign country, which partakes of the nature of a trade, it is competent for the court to appoint a manager. In a case relating to a West Indian estate, it was said that a manager is appointed, not for the purpose of carrying on the management of the estate, but to enable the court to give relief, when the cause is heard (*h*). Persons, for instance, have been appointed to manage landed property, to receive the rents and profits, and to convert, get in, and remit the proceeds of property and assets, in cases in which the property has been situate in India (*i*), in the West Indies (*k*), in Demerara (*l*), and in Brazil (*m*). Thus, where the whole undertaking of a limited company is situate abroad, the court may appoint a manager: managers have been appointed of railways in Venezuela (*n*), mines in Peru (*o*), railway and mines in Chile (*p*).

(*g*) *De Winton v. Mayor, &c.*,
of *Brecon*, 26 Beav. 542.

(*h*) *Waters v. Taylor*, 15 Ves.
10, at p. 25, per Lord Eldon;
see, too, *Sheppard v. Oxenford*,
1 K. & J. 500.

(*i*) *Logan v. Princess of Coorg*,
Seton, 7th ed. p. 776.

(*k*) Seton, 7th ed. p. 778; see,
too, *Barkley v. Lord Reay*, 2
Ha. 308.

(*l*) *Bunbury v. Bunbury*, 1
Beav. 336; *Bentinck v. Willink*,
1 L. T. 410.

(*m*) *Sheppard v. Oxenford*, 1

K. & J. 500; as to form of order,
see *ib.* 501. See, too, *Duder v.*
Amsterdamsch Trustees Kantoor
[1902], 2 Ch. 132, 144, where
the same persons were appointed
receivers in two actions for
enforcing different claims on the
same property.

(*n*) *Re South Western of Vene-*
zuela Railway Co. [1902], 1 Ch.
701.

(*o*) *Re Huinac Copper Mines*,
W. N. 1910, 218.

(*p*) *Re Arauco Co., Ltd.*, 79
L. T. 336.

A person resident in England may be appointed manager, with authority to appoint an agent abroad in the country where the property is situate(*q*); and sometimes a person resident in the country where the estate is situate is appointed manager(*r*). Where a receiver and manager appointed over mines in Peru belonging to a limited company, was unable to obtain possession because the *lex loci* only recognised the title of the company, the court ordered the company to appoint two attorneys to take possession on behalf of the receiver(*s*). It is not the practice in such cases to direct the attorneys to give security(*t*).

A person who obtains an order for the appointment of a receiver or manager of the property of a company, or appoints such receiver or manager under the powers of any instrument, must within seven days give notice to the registrar of companies, who thereupon enters the fact upon the register of mortgages(*u*).

In the absence of a restrictive covenant, the receiver and manager of a business may, on ceasing to act, set up a similar business on his own account, and solicit orders from or do business with, customers of the business of which he was formerly manager(*x*).

In cases where the manager of an estate must necessarily reside in the country where the estate is situated, it is usual to add to the order directing the appointment of a manager an order for the appointment of a consignee

(*q*) Seton, 7th ed. p. 777.

(*r*) Seton, 7th ed. p. 777.

(*s*) *Re Huinac Copper Mines*, 1910, W. N. 218. It is not the practice to direct that an attorney, allowed to be appointed in respect of property out of the jurisdiction, should give

security.

(*t*) *Per* Warrington, J., in Chambers, 18th January, 1912.

(*u*) Companies (Cons.) Act, 1908 (8 Edw. 7, c. 69), s. 94.

(*x*) *Re Irish*, 40 Ch. D. 49; *Re Gent*, 40 W. R. 267.

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Notice to registrar of companies.

Manager on ceasing to act may set up similar business.

Consignee.

Chap. XIII. or consignees resident in this country, to whom the produce of the property in question may be remitted, and by whom it may be disposed of (*y*).

A consignee, acting under an appointment by the court, is the paid agent of the court, to manage the estate which is in the hands of the court (*z*).

The right of the consignee of a West Indian estate, which gives him a lien on the plantation in respect of the balance due to him, is an exception from the general rule which applies to principal and agent (*a*).

Mode of
appoint-
ment of
manager
and con-
signee.

The course of proceeding under an order for the appointment of a manager and consignee is the same as that under an order for the appointment of a receiver, and the Rules of the Supreme Court which apply to receivers apply to managers and consignees also (*b*).

Security
must
generally
be given.

In some cases a manager of a West Indian estate has been appointed without giving any security (*c*); but, in *Rutherford v. Wilkinson* (*d*), Lord Gifford, M.R., intimated that that had been done only under special circumstances, and that in general, to warrant such a course, it should appear that no manager could be found who would give security, or that the person proposed was fit to be appointed without security. Under the particular circumstances of that case, he made the order for the appointment without security, by consent of such of the parties to the cause as could consent; but on a subsequent application in the same cause security was required (*e*).

A manager or consignee in England, unless he is the

(*y*) Seton, 7th ed. p. 778.

r. 1 (interpretation of the word "receiver").

(*z*) *Morison v. Morison*, 7 D.

M. & G. 226.

(*c*) Seton, 7th ed. p. 779.

(*a*) *Chambers v. Davidson*,

(*d*) 1b. 780.

L. R. 1 P. C. at p. 305.

(*e*) 1b. 780.

(*b*) R. S. C. Ord. LXXI.

trustee or other legal holder of the property, is required Chap. XIII.
to give the usual security to account for what he may receive (*f*), and ordinarily a person appointed to act abroad as manager must give the like security as a person resident in this country (*g*).

The manager of a West Indian estate is not required to give security to manage faithfully. Having a discretion given him to expend money on the estate, he is only required to give security to account for what he shall receive, and to consign so far as the due management of the estate permits (*h*). In a case where a testator had directed that a particular person should be appointed "receiver" of his rent and personal estates, and he died seised of no real estate, except an estate in the West Indies, the person named was appointed receiver, agent, and consignee, upon his entering into a personal recognizance to account for the produce (*i*).

An executor or trustee may be appointed consignee (*k*).
The appointment of a defendant, who is an executor or trustee, to be a consignee with the usual profits is a matter for the discretion of the court; but, when such a discretion has been exercised, and an appointment made under it has been acted on, the court will not afterwards withdraw its sanction from the appointment (*l*).

A consignee appointed by the court, like any other servant or agent of the court, if not affected with fraud or improper conduct, is not answerable for the wisdom,
Consignee, when not answerable for orders received.

(*f*) R. S. C. Ord. L. r. 16. 681.

(*g*) *Ib.*; *Cockburn v. Raphael*,
2 Sim. & St. 453.

(*h*) *Morris v. Elme*, 1 Ves. Jr.
139.

(*i*) *Hibbert v. Hibbert*, 3 Mer.

(*k*) *Marshall v. Holloway*, 2
Sw. 432.

(*l*) *Morison v. Morison*, 4 M.
& C. 215.

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Consignees have a charge on the property for payments authorised by the court.

correctness, or propriety of the orders which he receives, or for the directions by which his acts are sanctioned (*m*).

Consignees appointed by the court in an administration action have a charge on the property for payments sanctioned by the court, in priority to incumbrances created before the action, and will be allowed interest on a balance due to them (*n*). In *Re Tharp* (*o*) Lord St. Leonards allowed a consignee appointed by the court to be reimbursed from English estates of the same owners, although he was not receiver of the rents of those estates.

Manager appointed to act in the event of the death of present manager.

The court, in dealing with property in a colony, may provide against the inconveniences likely to arise from the death, absence, or incapacity of an existing manager, by appointing another person to act as manager in any of those events (*p*).

In *Forbes v. Hammond* (*q*) a reference to chambers was granted, to approve of a proper person to succeed the consignee of a West Indian estate in the event of his death, he being in a dangerous state of health; but this was done doubtingly, the Master of the Rolls observing that the person approved of might cease to be a proper person before the time when his office was to commence. He further remarked, on making the order, that the question must come before the court again on the report.

Manager not entitled to crops severed before his appointment.

It was held in one case that a receiver and manager of a West Indian estate, who had been appointed at the instance of a mortgagee, was not entitled to the produce

(*m*) *S. C.* 7 D. M. & G. 214,
at p. 223.

(*o*) 2 Sm. & G. 578.

(*n*) *S. C.* 2 Sm. & G. 564; 7
D. M. & G. 214.

(*p*) *Rutherford v. Wilkinson*,
Seton, 7th ed. p. 780.

(*q*) 1 J. & W. 88, 89.

of crops severed and shipped to the consignee of the mortgagor prior to the appointment of the receiver and manager, although the crops had not, at the date of the order appointing the receiver and manager, been received by the consignee (*r*). Chap. XIII.

The manager of a West Indian estate is entitled to a commission as long as he is resident in the island or colony, and is personally acting in the management of the estate (*s*). The commission is the reward of his personal care and attention (*t*). If and while he is absent from the island or colony, he is not entitled to charge commission, but he may be allowed any sums which he may have actually paid to others for the management of the estate during his absence, provided the payments were in themselves reasonable (*u*). Commission of manager.

Allowances.

Where the court has taken possession of an estate by a manager or consignee, it will, as against all parties for whose benefit the possession has been held, refuse to permit its officer to be discharged until the amount due to him has been paid (*x*). A manager is entitled to his ordinary commission and allowances, and also to a lien on the estate, as against all persons interested in it, for the balance, whatever it may be, that may be found due to him on taking his accounts (*y*). Manager or consignee not discharged until the amount due to him has been paid.

Where a balance is found due to a consignee on a final settlement of accounts, he will not be discharged until that balance is paid, and, if payment cannot be made without interfering with the inheritance or *corpus* of the

(*r*) *Codrington v. Johnstone*, 1 Beav. 520.

(*s*) *Forrest v. Elwes*, 2 Mer. 69.

(*t*) *Chambers v. Goldwin*, 9 Ves. 273.

(*u*) *Forrest v. Elwes*, 2 Mer. 68, at p. 70.

(*x*) *Fraser v. Burgess*, 13 Moo. P. C. 346.

(*y*) *Bertrand v. Davies*, 31 Beav. 436.

Chap. XIII. estate, the court will be justified in resorting to it for the purpose of doing justice to the consignee (z). But the case is different where, pending the consigneeship, an order is sought by a consignee that a balance found due to him may be paid out of the *corpus*. A consignee cannot, during the continuance of his office, come to the court from time to time, as often as there is a balance in his favour, and ask for payment of it out of the *corpus* of the estate (a).

(z) *Farquharson v. Balfour*, 8 Sim. 213.

(a) *Ib.*; and, as to cases in which the question was whether consignees of West Indian estates were entitled to be re-

imbursed out of money which had been awarded under the Act for the Abolition of Slavery, see *ib.*; and *Shaw v. Simpson*, 1 Y. & C. C. C. 732.

CHAPTER XIV.

APPOINTMENT OF A RECEIVER OUT OF COURT.

THERE are many cases in which the appointment of a receiver, or a receiver and manager, can be, and is, effected without resort to the court. Sometimes such an appointment is made by agreement between persons who are *sui juris*, as part of some transaction or arrangement between them; as, for instance, where partners appoint a receiver and manager to wind up the partnership business (*a*), or where, to secure the repayment by weekly instalments of an advance of money made by the trustees of a loan society to a small trader, he mortgages to them his shop, with the goodwill and takings of his business, and, with the concurrence of the lenders, appoints his cashier to be receiver of the takings, it being agreed that the receiver shall, out of the moneys received by him, pay the monthly instalments, and any rent, rates, taxes, premiums of insurance, expenses of repairs, or other sums of money which may have to be paid in order duly to maintain the security (*b*). More commonly, however, the appointment is made by virtue and in exercise of a power for the purpose, either

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When
receiver
appointed
out of
court.

(*a*) This had been done in *Prior v. Bayster*, W. N. 1887, 194, a case which has already been cited (*supra*, p. 258), in connection with the remuneration of receivers.

(*b*) A form of mortgage applicable to a case of this kind is given in Key & Elphinstone's *Precedents*, 9th ed., vol. 2, at p. 174.

Chap. XIV. expressed in an antecedent mortgage deed (c), debenture, debenture trust deed, or other instrument, or conferred by statute.

Who may
be ap-
pointed.

In exercising the power of appointing a receiver the mortgagee is in a fiduciary relation to the mortgagor: he must not therefore appoint himself; and if he does so, or if one of several mortgagees appoint one of themselves, the person appointed will not be allowed remuneration for his services (d). Where, however, the mortgagee is a company there is no such fiduciary relation between its directors and the mortgagor as to disentitle one of such directors to remuneration for his services as receiver (e).

Appoint-
ment by
mortgagee
independ-
ently of
statute
law.

Independently of statute law or contract, a mortgagee in possession of real property may of his own authority, if the distance or nature of the property be such as would require from him much time and trouble were he personally to collect the rents, appoint a receiver of them, and allow and charge a reasonable remuneration

(c) *E.g., Houldsworth v. Yorkshire, &c., Association* [1903], 2 Ch. 284, at p. 287, *affd. s. n. Illingworth v. Houldsworth*, [1904], A. C. 355, where the mortgagee of a company's present and future book-debts appointed a receiver, but the mortgage was held to be a "floating charge," and void for want of registration.

(d) *Nicholson v. Tutin*, 3 K. & J. 159.

(e) *Per Cozens-Hardy, M.R., and Buckley, L.J., in Bath v. Standard Land Co.* [1911], 1 Ch. pp. 626, 646, disapproving *Kava-*

nagh v. Workingman's Benefit Building Society [1896], 1 Ir. R. 56. It was held that a company which had entered into an agreement to manage and develop certain estates was not liable to account to the mortgagor for remuneration paid to directors for work done in their professional capacities, *e.g.*, as solicitor, &c., in connection with the estates; *secus*, in respect of remuneration for work which the company was bound to do under the agreement, such as keeping accounts.

for the receiver's services. But a receiver so appointed Chap. XIV. is the agent of the mortgagee only; and his possession also is that of the mortgagee, who is chargeable with equal strictness, whether he receives the rents personally or through his agent (*f*).

With the object of obtaining, under a mortgage of freeholds, copyholds, or leaseholds, the advantages, without the responsibilities, of possession, and especially of providing for the regular payment of the interest on the mortgage debt, the mortgagee sometimes stipulates for the appointment, at the time of the execution of the mortgage, of a receiver. In such a case the appointment may be made either in and by the mortgage deed, or by a separate deed (*g*); and the latter course has this advantage, that the deed can conveniently be delivered to the receiver, for production to the tenants as an authority for the payment of their rents to him. The appointment is expressed to be made by the mortgagor with the concurrence of the mortgagee, and the person appointed is expressly made the agent and attorney of the mortgagor, in his name to receive, and if necessary, to recover the rents of the tenants, with power to give receipts and make allowances; provisions are made for the manner and order of the application of the rents by the receiver, including the retention of his agreed remuneration, and for the appointment, if necessary, of a new receiver, and the mortgagor covenants with the mortgagee not to revoke the appointment or obstruct the receiver; but usually, it is also provided that the receiver

(*f*) Davidson's Precedents, 3rd ed., vol. 2, p. 641; *Leith v. Irvine*, 1 M. & K. 277, at p. 286. made by deed, but may be made by writing not under seal. Key & Elphinstone's Precedents, 9th ed., vol. 2, p. 271.

(*g*) The appointment is usually

Chap. XIV. is not to act until some interest is in arrear, or some other specified default on the part of the borrower, or event, has occurred (*h*). Where the appointment is made in this way, the receiver is to be regarded and treated as being for all purposes the agent of the mortgagor, although it is the mortgagee who in fact nominates the receiver (*i*).

In *Cradock v. Scottish Provident Institution* (*k*), the tenant for life of a landed estate covenanted, on the marriage of his daughter, to pay her an annuity, and in and by the same deed, after reciting that, in order to secure the payment of the annuity, it had been agreed that a receiver should be appointed, the covenantor appointed a receiver of the rents of the estate, and directed the tenants to pay their rents to him; and the deed went on to direct that all rents received should be applied in payment, firstly, of outgoings, and, secondly, of the annuity. It was held that the deed created an equitable charge on the life estate, which had priority over a subsequent incumbrance on it, taken with notice of the deed.

Lord Cranworth's Act.

By Lord Cranworth's Act (23 & 24 Viet. c. 145), which was passed in the year 1860, every mortgagee by deed of "hereditaments of any tenure, or any interest

(*h*) A full form of such an appointment is given in Key & Elphinstone's Precedents, 9th ed., vol. 2, at p. 69; see, too, Davidson's Precedents, 3rd ed., vol. 2, pp. 642, 648. The device of a demise of mortgaged lands by mortgagor and mortgagee to the receiver for a term of years, so as to give him the legal estate, thereby enabling him to distrain

upon the tenants in his own name, has occasionally been adopted, but it is not to be recommended generally. *Ib.* at p. 649.

(*i*) *Jefferys v. Dixon*, L. R. 1 Ch. 183, at p. 190; *Law v. Glen*, L. R. 2 Ch. 634, at p. 640.

(*k*) W. N. 1893, 146; affirmed in C. A., W. N. 1894, 88.

therein," was empowered (unless the powers conferred by the Act were negatived or varied by express declaration in the deed) to appoint or obtain the appointment of a receiver of the rents of the mortgaged property in certain specified events; and the Act went on to provide that a receiver so appointed should be deemed the agent of the mortgagor, to define the receiver's powers and duties, and to provide for his remuneration, removal, and so on (sections 11—24 and section 32). The sections of the Act of 1860 conferring the foregoing powers were repealed by section 71 of the Conveyancing Act of 1881 (44 & 45 Vict. c. 41); but the repealing section is so worded as to preserve the right of appointing a receiver in the case of mortgages executed before the year 1882 (*l*).

Since the coming into operation of the Conveyancing Act of 1881, mortgagees by deed have usually been content to rely on the provisions with respect to receivers contained in that Act, either without any modification of these provisions, or with such modifications of them as may be appropriate to the circumstances of the particular instrument and transaction.

By the 19th section of the Act of 1881 it is enacted as follows:—

"A mortgagee, where the mortgage is made by deed (*m*), shall, by virtue of this Act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):—

"(1.) * * * (iii.) A power, when the mortgage

(*l*) See *Re Solomon and Meagher's Contract*, 40 Ch. D. 508, at p. 511.

(*m*) The statutory powers, therefore, do not apply to a mortgage by deposit not accom-

panied by a memorandum under seal, or to a mortgage of copyholds effected by conditional surrender only. Key & Elphinstone's *Precedents*, 9th ed. vol. 2, p. 40.

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Convey-
ancing Act
of 1881.

Section 19
of Act of
1881.

Chap. XIV. money has become due, to appoint a receiver of the income of the mortgaged property or of any part thereof.

“(2.) The provisions of this Act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the same manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this Act.

“(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

“(4.) This section applies only where the mortgage deed is executed after the commencement of this Act.”

Interpre-
tation of
“mort-
gage,” &c.

It is to be borne in mind, in construing the section just quoted, and also the section which is about to be quoted in the next paragraph, that, in the Act of 1881, (section 2, (vi.)), “mortgage includes any charge on any property for securing money or money’s worth; and mortgage money means money, or money’s worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor, or entitled to redeem a mortgage, according to his estate, interest, or right in the mortgaged property; and mortgagee includes any person from time to time deriving title under the original mortgagee.”

Section 24
of Act of
1881.

It is further enacted, by the 24th section of the Act of 1881, as follows:—

“(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act, shall not appoint a receiver until he has become entitled to

exercise the power of sale conferred by this Act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver. Chap. XIV.

“(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver’s acts or defaults, unless the mortgage deed otherwise provides.

“(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same.

“(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.

“(5.) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand (n).

“(6.) The receiver shall be entitled to retain, out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose.

“(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or

(n) See *Croghan v. Maffett*, 26 L. R. Ir. 671.

Chap.XIV. damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

“(8.) The receiver shall apply all money received by him as follows, (namely) :

“(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property ; and

“(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver ; and

“(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed, or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee ; and

“(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage ;
“and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property (o), or who is otherwise entitled to that property.”

In connection with the above 19th and 24th sections there are several points to be noticed.

Inasmuch as, by the terms of the Act, the statutory power of appointing a receiver does not arise until the

Observations on sections 19 and 24 of Act of 1881.

(o) *I.e.*, *primâ facie* the mortgagor, see *White v. Metcalf* [1903], 2 Ch. p. 572 ; *Turner v. Walsh* [1909], 2 K. B. p. 496. It is suggested that a mortgagee

may direct payment to himself of the balance, but that this would amount to entering into possession.

mortgage money has become due, nor even then, unless Chap.XIV. the mortgagee has become entitled to exercise the power of sale conferred by the Act, express provision for the appointment of a receiver must be made in a mortgage deed, in case it is desired by the mortgagee to have power to appoint a receiver before the mortgage money has become due, or at a time when the statutory power of sale would not be exercisable. Where the Act alone is relied upon, it is a condition precedent to the exercise of the statutory power of appointing a receiver that there be, under the particular mortgage deed, a statutory power of sale which is presently exercisable (*p*).

The mere fact that a receiver of rents has been appointed by a mortgagee under the statutory power does not prevent the mortgagee, at all events if the receiver has not received anything, from bringing an action against the mortgagor, with the writ specially indorsed under R. S. C. Order III. rule 6, for the principal and interest due under his covenants in the mortgage deed, and applying for summary judgment under R. S. C. Order XIV. ; but if, on such an application, it appears that there is a real question as to the amount due, leave to defend will be granted (*q*).

(*p*) The events in which a mortgagee will, according to the terms of the Act, become entitled to exercise the statutory power of sale are set forth in s. 20 of the Act; but the provisions of that section may be varied in any case by agreement between the parties (s. 19 (2)), quoted *supra*, p. 334; and where, for instance, mortgage money is to be repayable by

instalments, the deed should make the power of sale exercisable upon default in payment of any instalment. See and consider Hood & Challis' Conveyancing, etc., Acts, 7th ed. pp. 89, 99; Key & Elphinstone's Precedents, 9th ed. p. 47.

(*q*) *Lynde v. Waithman* [1895], 2 Q. B. 180, at pp. 184, 188; explaining *Earl Poulett v. Viscount Hill* [1893], 1 Ch. 277.

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Payment
of debts,
and for
repairs.

Where, by the terms of a receiver's appointment under the Act, no power is given to him to act otherwise than in accordance with the provisions of section 24, he would not be justified, it is conceived, in paying an unsecured debt of the mortgagor not affecting the mortgaged property (*r*). And so, as regards repairs (cf. sub-section 8 (i.)), he could not justify any expenditure except in respect of necessary or proper repairs, paid for out of the income of the mortgaged property on the express direction of the mortgagor (*s*). But where a deed mortgaging a business to secure an annuity provided, not only that the mortgagee might exercise the statutory power of appointing a receiver, but also that the receiver might manage and carry on the business as he might think fit, and the mortgagor, having incurred a trade debt and having promised the creditor to pay it off by instalments, died, and afterwards the mortgagee appointed a receiver over the business "with full power to manage and carry on the same as he may think fit," it was held that, by virtue of the above express extension of the receiver's powers, he had authority to go on paying the instalments of the trade debt, with the result of raising an implied promise to pay the balance of the debt out of the mortgagor's assets, which promise prevented the debt from becoming statute-barred. The death of the mortgagor did not affect the mortgagee's power of appointing a receiver, and the receiver, when appointed, had power on behalf of his principal (*t*), the executrix of the original mort-

(*r*) *Re Hale, Lilley v. Foad* [1899], 2 Ch. 107, at pp. 117, 119.

(*s*) *White v. Metcalf* [1903], 2 Ch. 567, at p. 573, in which case the position of a receiver under

the Act was discussed at some length.

(*t*) See s. 24 (2) of the Act, and the interpretation of the word "mortgagor" in s. 2 (vi.), quoted *supra*, p. 334.

gagor, to pay the instalments in the same manner, and with the same legal results, as if they had been paid by the executrix herself (*u*). Chap. XIV.

Again, it follows from the provisions of sub-section (2) of the 24th section of the Act that, if a statutory receiver, having got money into his hands, pays it away improperly to the mortgagor or otherwise than in accordance with the instrument of appointment, the mortgagee who appointed him is not answerable for his default. The mortgagee is only bound to give credit for such sums as reach his hands (*x*).

Coming now to sub-section (3),—it is enacted that the receiver may recover income by action “in the name either of the mortgagor or of the mortgagee.” It was accordingly held, in an Irish case decided in the year 1889, that, a mortgagor having died leaving the mortgaged property to his trustees, of whom one predeceased him and the other disclaimed, the receiver appointed under the Act was entitled, pending the appointment of new trustees, to bring an action against a tenant for rent in the name of the mortgagor’s heir-at-law, as being the “mortgagor” (*y*) for the time being, on giving him a proper indemnity (*z*). Section 24,
sub-s. (3)
(Act of
1881).

It is further to be borne in mind that, while this third sub-section says that the receiver may distrain in the name either of the mortgagor or of the mortgagee, it does not Distress.

(*u*) *Re Hale*, *ubi supra*, at pp. 118, 120.

(*x*) *Re Della Rocella’s Estate*, 29 L. R. Ir. 464, at p. 468, in which case the receivership deed directed the receiver to pay creditors pursuant to s. 24, “save that, in priority to all

other charges except rent, rates, and taxes, he shall pay any reasonable costs or charges incurred by” the mortgagees.

(*y*) See note (*t*), p. 338.

(*z*) *Fairholme v. Kennedy*, 24 L. R. Ir. 498.

Chap. XIV. say that, where a receiver of the rents of mortgaged property has been appointed by the mortgagee, the mortgagor may himself distrain, without any authority from the receiver. As long as the receivership is in force, and the receiver's notice to the tenants of his appointment has not been withdrawn, no valid distress can be levied except by the receiver, or by some person, including the mortgagor, authorised by him (*a*). In the absence of such authority, the mortgagor may, it is conceived, be restrained by injunction from distraining for rent due from a tenant of part of the mortgaged property, even though the receiver may have been negligent in collecting the rents (*b*).

If a receiver, appointed by mortgagees under the Act of 1881, distrains under the statutory power after the title of the mortgagees has come to an end, he may be sued by the tenant, and be made personally liable in damages, on the ground of wrongful distress (*c*).

Section 24,
sub-s. (8)
(Act of
1881).

In virtue of the direction contained in sub-section 8 (iv.) of the same section (24), a receiver appointed by mortgagees is bound to pay any arrears of interest due to the mortgagees at the date of his appointment, as well as interest accruing due subsequently (*d*). And in a later action (*e*), which arose out of the mortgage transaction which gave rise to the last cited case, it was held by the Irish Court of Appeal that the mortgagor, although he had not been a party to a bond given to the mortgagees

(*a*) *Woolston v. Ross*, [1900], 1 Ch. 788, at p. 791.

(*b*) *Bayly v. Went*, 51 L. T. N. S. 764; W. N. 1884, 197.

(*c*) *Serjeant v. Nash, Field & Co.* [1903], 2 K. B. 304.

(*d*) *National Bank v. Kenny*

[1898], 1 Ir. R. 197, an action by mortgagees against receiver for an account, etc.

(*e*) *Kenny v. Employers' Liability Assurance Corporation* [1901], 1 Ir. R. 301.

by the receiver and his surety, conditioned for the faithful discharge of the receiver's duties, was a person so vitally interested in the discharge of those duties as to be entitled to maintain an action (joining the mortgagees, the obligees of the bond, as co-plaintiffs) against the surety, for the recovery from the latter of a sum of money collected by the receiver, which, on his failure to pay it over as he ought to have done to the mortgagees, they had obtained by selling a portion of the mortgaged property. Chap.XIV.

Lastly, it is noticeable that the Act of 1881 confers upon a statutory receiver no power of leasing; and that, although a puisne mortgagee by deed may appoint a receiver, he is liable to be ousted from possession by a receiver subsequently appointed by a prior mortgagee by deed of the same property (*f*).

By section 3 (11) of the Conveyancing Act, 1911 (1 & 2 Geo. 5, c. 37), the powers of leasing and accepting surrenders of leases respectively conferred by section 18 of the Conveyancing Act, 1881, and section 3 of the Conveyancing Act, 1911, are, after a receiver has been appointed of the mortgaged property or any part thereof by a mortgagee under the Act of 1881, and so long as the receiver acts, exercisable by such mortgagee instead of by the mortgagor as respects any land affected by the receivership as if such mortgagee were in possession of the land.

In *Blaker v. Herts and Essex Waterworks Co.* (*g*), Kay, J., expressed, *obiter*, an opinion to the effect that the power of sale, and presumably also the power of appointing a receiver, conferred on mortgagees by deed Appointment of receiver by or for debenture holders.

(*f*) See Hood & Challis' Conveyancing, etc., Acts, 7th ed. (*g*) 41 Ch. D. 399, at pp. 405, 406.
p. 102.

Chap. XIV. by the 19th section of the Conveyancing Act of 1881 did not apply to, so as to be exercisable by, the holders of mortgage debentures of a company formed under the Companies Acts. The decision, however, proceeded on the ground that as the undertaking was of a public nature no power of sale could be implied (*h*), and in a later case (*i*) before the Court of Appeal it appears to have been assumed that these *dicta* of Kay, J., cannot be supported. Whether that is so or not, there is no doubt that such debentures, and also what are called debenture trust deeds, validly may, by the use of apt language for the purpose, provide for the appointment by the debenture holders, or by their trustees (as the case may be), of a receiver, or a receiver and manager, of the property charged by the debentures, or comprised in the trust deed, and may incorporate with the debentures or trust deed, either without or with any modification which may be desired, the above-quoted provisions of the Act of 1881 relating to receivers. And that is very commonly done; and, in pursuance of the terms of the instruments authorising such an appointment, receivers are appointed, whose powers and position in each particular case are derived from, and depend upon, the contract between the parties expressed in the authorising instrument (*k*).

Where, therefore, a trust deed for securing a company's debentures empowers the trustees to appoint a receiver and manager, who is to be the agent of the company and

(*h*) See *Deyes v. Wood* [1911], 1 K. B. p. 818.

(*i*) *Deyes v. Wood* [1911], 1 K. B. 806.

(*k*) See *Palmer's Company Precedents*, Part III. 10th ed. pp. 258, 302, 426, 452, where

forms of provisions for the appointment of receivers by debenture holders, and by the trustees of debenture trust deeds, and for the indemnification of receivers appointed by such trustees, are given.

in the same position as a receiver appointed by a mortgagee under the Conveyancing Act of 1881, a receiver and manager so appointed, and carrying on the company's business in the company's name, is a mere agent of the company, and neither he (*l*), nor the trustees who appointed him (*m*), is or are under any personal liability for debts incurred in carrying on the business. And further if, in consequence of an order for the winding up of the company, such a receiver and manager ceases to be the company's agent, he does not, merely by continuing to act, make the trustees liable as his principals, unless they have authorised him to act as their agent (*m*).

But where the instrument authorising the appointment omits to state that the receiver, when appointed, is to be the agent of the company, then it may be inferred from the terms of the instrument that he is the agent for the debenture holders, as, for instance, where he is given powers largely in excess of those conferred on receivers by the Conveyancing Act, 1881 (*n*). When this is the case, the debenture holders will be themselves personally liable to persons dealing with the receiver, and also to the receiver for his remuneration. Thus, where debentures omitted to state that the receiver was to be the agent of the company, and conferred wide powers upon him, including a power to carry on the business for the debenture holders and to sell it, it was held that the receiver was the agent of the debenture holders, who were accordingly personally liable to persons dealing

(*l*) *Owen & Co. v. Cronk* 470; *Robinson Printing Co. v. Chic, Ltd.* [1905], 2 Ch. 123; [1895], 1 Q. B. 265.

(*m*) *Gosling v. Gaskell* [1897], *Deyes v. Wood* [1911], 1 K. B. A. C. 575, 806.

(*n*) *Re Vimbos* [1900], 1 Ch.

Chap. XIV. with him, and that charges created by the receiver in priority to the debentures were valid (*o*). Where debentures specifically incorporated certain of the provisions relating to receivers contained in the Conveyancing Act, 1881, but conferred also large additional powers, including a power to carry on the business and to sell, the Court of Appeal held that there was sufficient contrary intention within section 24 (2) of the Conveyancing Act, 1881, to prevent the receiver being agent for the company, and that he was agent for the debenture holders, and therefore entitled to recover his remuneration from them (*p*).

The powers of a receiver appointed under an instrument depend upon the terms of such instrument: where the powers were wide it was held that they extended to enable him to pledge existing assets and debts to accrue due during his receivership, but not debts accruing due after he had ceased to act (*q*). It appears that although the receiver may be the agent of the debenture holders, so as to render them personally liable to persons dealing with him, he is at the same time for some purposes the agent of the company; for instance, so far as to enable him to make a charge upon the assets effective or to sell the assets (*r*).

Where winding-up order has been made.

In a case in which the debenture holders of a company were, by the terms of their debentures, entitled, in the event of proceedings being taken to wind up the company, to appoint a receiver as if they were mortgagees within the meaning of the Conveyancing Act, 1881, and

(*o*) *Robinson Printing Co. v. Chic, Ltd.* [1905], 2 Ch. 123.

Chic, Ltd. [1905], 2 Ch. 123.

(*r*) See *Robinson Printing Co.*

(*p*) *Deyes v. Wood* [1911], 1 K. B. 806.

v. Chic, Ltd. [1905], 2 Ch. p. 133; *Deyes v. Wood* [1911], 1

(*q*) *Robinson Printing Co. v.*

K. B. p. 821.

to invest him with wide powers of managing the company's business, and disposing of its property, and after an order for winding up the company had been made and a liquidator appointed, the debenture holders exercised their power of appointment, it was held by the Court of Appeal that the court ought not to interfere with the right of the debenture holders to have their own receiver, and leave was given to their receiver, notwithstanding the appointment of a liquidator, to take possession of the company's property charged by the debentures, without prejudice, however, to any question as to the powers of the receiver, other than his power of taking possession of and selling the property (*s*).

Where a receiver appointed by debenture holders is incurring large liabilities, a winding-up order may be made on the petition of creditors, although it cannot be shown that there will be any surplus assets for them, or that they will gain any advantage from the order (*t*).

As a receiver appointed by debenture holders is an agent either for them or the company, his personal liability to persons with whom he contracts depends upon the principles of the law of agency (*u*): he may render himself liable by expressly or impliedly pledging his own credit (*x*). If he interferes with the rights of third parties, however innocently, he is personally liable as a trespasser, and the debenture holders are in the same position if he has acted within the scope of his authority. Thus, where a receiver and manager of the

Chap. XIV.

Liability of
receiver
appointed
by debenture
holders.

(*s*) *Re Henry Pound, Son & Hutchins*, 42 Ch. D. 402.

(*u*) See Smith's Leading Cases, 11th ed. p. 390.

(*t*) *Re Chic, Ltd.* [1905], 2 Ch. 345; and see *Re Crigglestone Coal Co.* [1906], 2 Ch. 327.

(*x*) *Robinson Printing Co. v. Chic, Ltd.* [1905], 2 Ch. 123.

Chap. XIV. undertaking of a company had been appointed by debenture holders, and subsequently the assignment to the company of the whole of its assets was set aside as fraudulent within 13 Eliz. c. 5, in such circumstances that the title of the trustee in bankruptcy of the vendor related back, the receiver and the debenture holders were held liable as trespassers in respect of all such parts of the property in question as had come into the hands of the receiver, and an inquiry was directed as to the amount thereof: they were, however, only liable in respect of the actual property which had belonged to the bankrupt, not in respect of assets into which it had by sale been converted, nor for profits (*y*).

Where a receiver appointed by debenture holders had paid into court, to a separate account in his name, money received under a contract, it was held that he came within the category of agents who have handed money over to their principals, and was not, therefore, liable to judgment for breach of contract (*z*).

Notice of
appointment to
be given
to and
accounts
filed with
registrar.

Notice must be given by the person making the appointment to the registrar of companies of the appointment of a receiver or manager of the property of any company under powers contained in an instrument, within seven days of the appointment: entry is thereupon made on the register of mortgages (*a*). The receiver and manager so appointed must file with the registrar an abstract of his accounts every half year and on ceasing to act, and also notice of his ceasing to act (*b*).

(*y*) *Re Goldbury* [1912], 1
K. B. 606.

(*z*) *Bissell v. Ariel Motors, Ltd.*,
27 T. L. R. 73.

(*a*) Companies (Cons.) Act.
1908 (8 Edw. 7, c. 69), s. 94.

(*b*) *Ib.*, s. 95.

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